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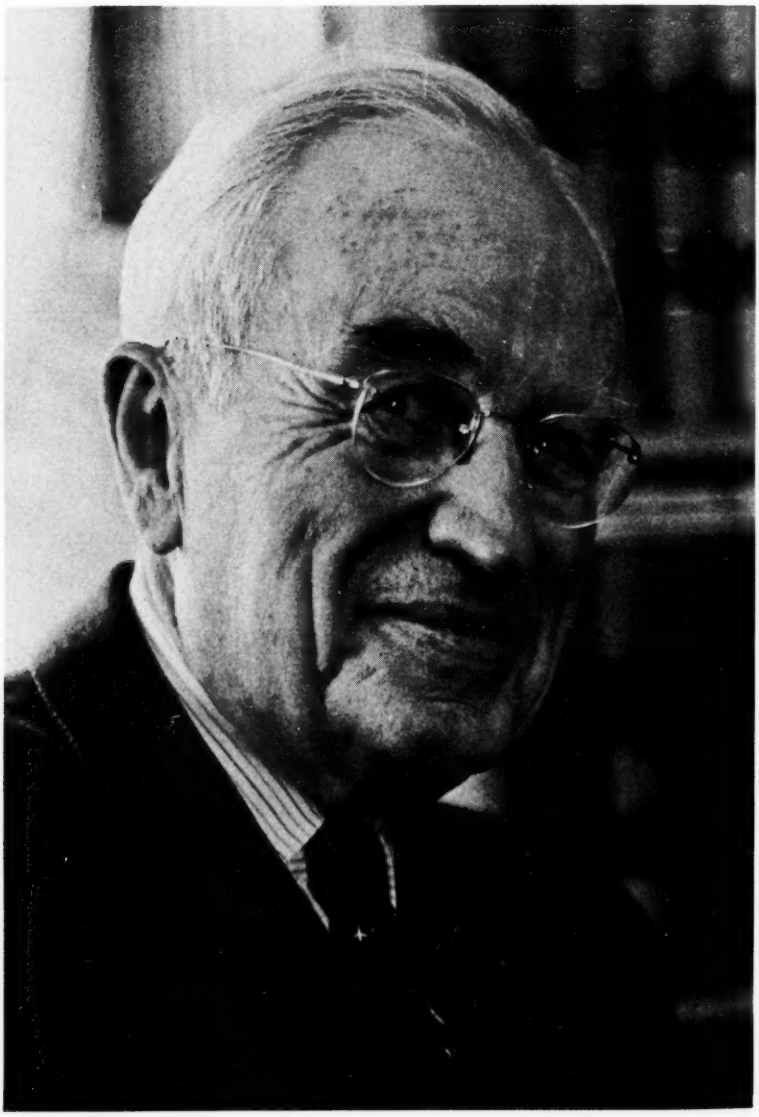
A SEVENTY-FIFTH BIRTHDAY DEDICATION TO



JOHN COBB COOPER, LL.D.

Born September 18, 1887 at

Jacksonville, Florida, U.S.A.

JOHN COBB COOPER

1 Armour Road, Princeton, New Jersey

John Cobb Cooper was born in Jacksonville, Florida September 18, 1887. Following his primary education in the public schools of Jacksonville, he attended the Lawrenceville School, Lawrenceville, New Jersey, from which he graduated in 1905. He entered Princeton University in the fall of 1905 and graduated Phi Beta Kappa with the degree of Bachelor of Arts (A.B.) in June, 1909. Following his graduation from Princeton, Professor Cooper read law in Jacksonville, Florida and was admitted to the Florida bar in June, 1911. From that time until his entry into the naval service in May of 1917 he held numerous civic and bar association posts. On being commissioned an Ensign in the Navy in May, 1917, he was called to active duty at the Charleston Navy Yard as a communications officer and throughout his service in the Navy he rose in rank and posts until he ultimately was in charge of all trans-Atlantic radio communications. While on duty in the Navy Department in Washington, he married Martha Helen Marvel, January 5, 1918. Mrs. Cooper died February 11, 1962.

On release from active naval duty in March, 1919, Professor Cooper returned to Jacksonville and reentered the practice of law, and in the period from 1919 through 1933 he served in numerous state and federal bar posts, the most important of which for our purposes was the American Bar Association Committee on Aeronautical Law. In 1932 Professor Cooper was appointed one of the first United States members of the International Technical Committee of Aerial Legal Experts (CITEJA), and in 1933 he was appointed chairman of the United States delegation to the Third International Conference on Private Aerial Law held at Rome, signing for the United States the first Rome Convention on Liability to Third Parties on the Surface.

In 1934 Professor Cooper was elected Vice President of Pan American Airways which he served in that capacity, and later as a director, until 1945. During those years he was active in negotiations which lead to the organization and operation of the first trans-Pacific and first trans-Atlantic scheduled air services. In 1944 he was appointed one of the advisors to the United States delegation at the International Civil Aviation Conference in Chicago and served as the chairman of the two drafting committees which prepared the "Chicago Convention," setting up the International Civil Aviation Organization. Following the Chicago Conference in 1944, Professor Cooper was made a member and subsequently became chairman of a committee representing international air transport operators, and he was influential in the organization and operation of the International Air Transport Association (IATA), serving the organization as Director General, member of the Executive Committee and Legal Advisor.

1945 Professor Cooper retired from Pan American Airways to accept appointment as a member of the Institute for Advanced Study at Princeton in order to engage in individual legal research on air law problems. In 1951, at the invitation of McGill University, he organized and became the first director of the International Institute of Air Law, which he served until 1955, with the rank of Professor of International Law. In 1952, McGill awarded him the degree of Master of Laws (LL.M.) and in 1955 made him Professor Emeritus. Throughout the entire period from 1944 to date Professor Cooper has engaged in scholarly research, and while working at the Institute for Advanced Study became interested in basic legal problems presented by high altitude flight, the subject now referred to as "Space Law." On January 5, 1951 he presented an address at Escuela Libre de Derecho, Mexico City, entitled "High Altitude Flight and National Sovereignty," considered by many to be the first modern discussion of basic space law problems. Since that time he has continued to publish articles and appear as guest lecturer throughout the world. He was a Founding Member of the International Academy of Astronautics and of the International Institute of Space Law, of which he was one of the first directors and the President for the year, 1961.

In 1960 Princeton University conferred on Professor Cooper the honorary degree of Doctor of Laws (LL.D.). He is a Fellow, American Academy of Arts and Sciences; Fellow, British Interplanetary Society; member American Bar Association, American Law Institute, American Society of International Law, International Law Association, Institute of Aerospace Sciences, American Rocket Society, and other organizations. His publications include "The Right to Fly," 1947; "The Fundamentals of Air Power," 1948; "Roman Law and the Maxim 'Cujus Est Solum' in International Air Law," 1952; and various articles on air and space law.

THE JOURNAL OF AIR LAW AND COMMERCE

VOL. 28 AUTUMN, 1961-62 NO. 4

TABLE OF CONTENTS

JOHN COBB COOPER COMMEMORATIVE ESSAYS

INTRODUCTION . . . . . *P. K. Roy* 327

"EXEMPTION CLAUSES GOVERNING LOSS OR DAMAGE RESULTING FROM THE INHERENT DEFECT, QUALITY OR VICE OF THE CARGO" . . . . . *Prof. H. Drion* 329

"LEGAL PROBLEMS OF OUTER SPACE" . . . . *Prof. Dr. Alex Meyer* 339

"JOHN COBB COOPER AND MCGILL'S INSTITUTE OF AIR AND SPACE LAW" . . . . . *Prof. A. B. Rosevear* 346

"CONTRIBUTIONS OF SPACE AND INTERPLANETARY LAW TO JURIDICAL SCIENCE" . . . . . *Dr. A. A. Cocca* 351

"THE INTERNATIONAL ASTRONAUTICAL FEDERATION AND THE USE OF SPACE FOR PEACEFUL PURPOSES" . . *Dr. Antonio Francoz Rigalt* 356

"SPACE EXPLORATION AND SPACE LAW" . . . *Dr. Victor J. Delascio* 364

"LIABILITY OF THE GRATUITOUS AIR CARRIER UNDER FRENCH LAW" . . . . . *Andre Garnault* 369

"THE CONFLICTS AND STATE OBLIGATIONS UNDER THE WARSAW CONVENTION, THE HAGUE PROTOCOL AND THE GUADALAJARA CONVENTION" . . . . . *Dr. Julian Gazdik* 373

"LEGAL STATUS OF CELESTIAL BODIES" . . . . *Dr. Michel Smirnoff* 385

LEADING ARTICLES

"DAMAGE CAUSED BY FOREIGN AIRCRAFT TO THIRD PARTIES" . . . . . *Dr. Gerd Rinck* 405

"ROME CONVENTIONS OF 1933 AND 1952: DO THEY POINT A MORAL?" . . . . . *Elizabeth Gaspar Brown* 418

INTERNATIONAL REVIEW. 444

CURRENT LEGISLATION AND DECISIONS 453

BIBLIOGRAPHY 461

John Cobb Cooper Commemorative Essays

INTRODUCTION

By P. K. Roy†

THE articles which follow have been written in honour of Professor John Cobb Cooper on the occasion of his seventy-fifth birthday on September 18, 1962.

The name of John Cobb Cooper is known to air lawyers throughout the world; most of them have read his writings and have thereby greatly profited. Some of these readers are his confrères of old, as members of CITEJA,[1] and many were associated with him at the international conferences on air law or other aviation meetings which he attended as a Member or Chairman of the Delegation of the United States of America, or as representative of the International Air Transport Association.

Professor Cooper's devotion to research and historical scholarship gave the air lawyer everywhere the book "The Right to Fly," and to his countrymen in particular the book "Sources of our Liberties," which deals with the legal sources of individual liberties of the American citizen. His historical scholarship has served to remind us that the rule of State sovereignty over territorial airspace is not—as is stated sometimes—a conventional stipulation, appertaining only to the parties to the Chicago Convention of 1944 or even the Paris Convention of 1919, but has been, for at least half a century, a part of customary international law: "Thus it is apparent that by the outbreak of World War I the principle of sovereignty in usable space over national lands and waters had been accepted by the international community as a customary rule."[2]

To John Cobb Cooper the world of civil aviation is indebted for his outstanding work as Chairman of the Drafting Committees at the Chicago Conference in 1944; and unless I am mistaken, it was his pen which wrote into the Convention on International Civil Aviation there formulated the part of Article 12 which states: "Over the high seas, the rules in force shall be those established under this convention." By this single sentence there was constituted an international legislative authority for the making of rules relating to flight and manoeuvre of aircraft in the air space above the high seas.

Remarkable as are his qualities as lawyer, scholar and law teacher, perhaps Professor Cooper's foremost characteristics are his foresight and pioneering spirit, which have made him one of the outstanding leaders in the new field of space law. Almost nine years before the first Sputnik, in the lecture "International Air Law" delivered at the United States Naval War College on December 20, 1948, he made the remarkable, prophetic observation: "In view of the fact that some of my scientific friends are convinced that rockets or other guided missiles may be propelled from

† Director, Legal Bureau, International Civil Aviation Organization.

[1] Comité international technique d'experts juridiques aériens.

[2] *State Sovereignty in Space: Developments 1910 to 1914*, 32 Beiträge Zum Internationalen Luftrecht (1954).

the earth to the moon within a comparatively few years, the problem presents curious political and geographic difficulties," the problem in question being "to what height above the surface of the earth can the sovereignty of a State be extended."

It is only fitting that the far-reaching influence of Professor John Cobb Cooper throughout the world be acknowledged through papers written especially to commemorate his seventy-fifth birthday. The happy thought of thus paying homage to the Dean of American air lawyers was born at Washington, D. C., some months ago at my meeting with the German Dean of air lawyers, Professor Dr. Alex Meyer, whose own seventy-fifth birthday was celebrated similarly with a *Festschrift* in 1954. Following consultations with other friends also, I gladly undertook the function of soliciting and collecting these writings. There was no danger of a lack of articles for the friends and admirers of Professor Cooper are legion: they range from those who were his students at the Institute of International Air Law, McGill University, to others not as young. However, invitations had to be limited. If a large number of articles were requested, they might all in fact be received! And that could have proved embarrassing, for the means of financing the project were yet to be decided upon. So, Dean J. W. Riehm was approached with the suggestion that the problem of financing would be solved if the articles could be included in an issue of the Journal of Air Law and Commerce, with which Professor Cooper has been so closely associated. The response was ready and generous. Accordingly, the articles appear in the present issue of the Journal. It may be added that the Journal exercised no authority over the choice of subject matter of these articles or, save for editorial re-touching in a few cases, their treatment, such questions being left to the entire discretion of the writers.

The authors of the articles deserve our best thanks for having written them; and we are greatly indebted to the Journal, and particularly to Dean Riehm, for the benevolent role the Journal has played in publishing the articles.

Professor Cooper's interests and work have covered many fields, so do the articles here collected. We have the article "Exemption Clauses Governing Loss or Damage Resulting from the Inherent Defect, Quality or Vice of the Cargo," by Professor Cooper's former student, Mr. H. Drion, now himself a professor of eminence at Leiden University (Netherlands); and also the article on "Legal Problems of Outer Space," by that authority in the field of space law, Professor Dr. Alex Meyer, now in his eighty-third year.

It was thought fitting that there should be an article from Montreal, for this is where Professor Cooper spent many years and where two of the institutions in the foundation of which he played a foremost role are located, the International Air Transport Association and the Institute of Air and Space Law, McGill University. Hence, we have the article "John Cobb Cooper and McGill's Institute of Air and Space Law," from Professor A. B. Rosevear, Q.C., a successor of Professor Cooper as Director of the Institute. As a geographical counter-balance to northerly Montreal, we have, from one of the southernmost countries on the globe, Argentina, the article of Dr. A. A. Cocca: "Contributions of Space and Interplanetary Law to Juridical Science." From Mexico City, where Professor Cooper

delivered his celebrated address on "High Altitude Flight and National Sovereignty," we have, appropriately, the article "The International Astronautical Federation and the Use of Space for Peaceful Purposes" by Dr. Antonio Francoz Rigalt. In a related vein, is the contribution from Dr. Victor J. Delascio, of Venezuela, entitled "Space Explorations and Space Law." One might almost hear the forensic voice of Maïtre André Garnault, of Paris, France, come from the article entitled "Liability of the Gratuitous Air Carrier Under French Law." Dr. Julian Gazdik, close associate of Professor Cooper in IATA, gives us a close analysis of an important problem in "The Conflicts and State Obligations Under the Warsaw Convention, the Hague Protocol and the Guadalajara Convention." Last, but not least, we have an article from Yugoslavia by Dr. Michel Smirnoff on the "Legal Status of Celestial Bodies."

This introduction and these articles constitute offerings made in great esteem and with affection to Professor John Cooper to commemorate a special occasion. It is hoped they will please him.

EXEMPTION CLAUSES GOVERNING LOSS OR DAMAGE RESULTING FROM THE INHERENT DEFECT, QUALITY OR VICE OF THE CARGO

By Huibert Drion†

THE Hague Conference of 1955, which adopted the Protocol to the Warsaw Convention, has added a new paragraph 2 to Article 23 of the Convention. According to Article 23 "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void." The new paragraph added by The Hague Protocol provides that "paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

The drafting history of this new provision may be traced back to the (1953) Rio Session of the Legal Committee of ICAO, which preceded The Hague Conference. This history is instructive of some of the "inherent defects" of international conferences on legal matters, and for that reason it deserves to be studied in some detail. One cannot ignore the drafting history when trying to determine the meaning of the somewhat "cabalistic" formula—to borrow a qualification used by one of its supporters—by which the Warsaw Convention was enriched.

At the Rio Conference, the United Kingdom delegate (Wilberforce) proposed that a provision be inserted in the new Convention. It concerned the air carriers' liability as envisaged at that stage of the discussions. The provision read as follows:

> Notwithstanding the provisions of Article 17(1) [being a somewhat redrafted Article 23] or any other provision of this Convention, for the carriage of live animals, perishable goods or fragile articles, the carrier shall be entitled to provide in the agreement to carry that he shall not be liable for the loss, damage or delay of such animals, goods or articles, and such a pro-

† Professor of Civil Law, University of Leiden, Netherlands.

> vision shall be a valid defence to any claim in respect thereof, except in cases where the conditions mentioned in Article 15(7) apply.[1]

Various delegates supported the proposal, others opposed it, for various reasons.[2]

Answering an objection of the Swedish delegate, Mr. Wilberforce suggested that "the Committee should agree, in principle, that the carrier was not to be entitled to exclude such liability as would have attached in any event apart from the nature of the consignment." After further discussion, the matter was referred to a Working Group, which produced an entirely new formula. It proposed that the following proviso should be added to the new Article 23: "provided that this Article shall not apply to provisions governing loss or damage resulting from wastage in bulk or weight or from inherent defect, quality or vice of goods carried, including live animals."

When calling this an entirely new formula, I did so only with reference to the original U. K. proposal. In fact the Working Group text was not new at all, and it was not meant to be so. On the contrary, the Chairman of the Working Group explained that the text had been taken

> verbatim from the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, which, in turn, reflected language that had been used for a long time in connection with admiralty contracts, with charter bodies [sic] and with policies of insurance.[3]

As could be expected, the idea of borrowing a legal phrase "well consecrated in international law," proved agreeable to the majority of the Committee, though there was some discussion as to certain terms. However one problem of material interest raised by the new formula received little attention. The question raised by the Netherlands delegate, whether the new provision would permit carriers to exempt themselves from liability for damages resulting from inherent defects, etc., *in case of negligence,* remained unanswered.[4] This was the more remarkable because the original proposal by the U. K. delegate had clearly allowed the permitted exemption clauses to extend to cases of carriers' negligence by only excluding their validity in case of wilful misconduct.

The text which the Legal Committee at Rio finally adopted was almost the same as the definitive text of The Hague Protocol, with some interchanging of the rather hazy terminology: Instead of speaking of "inherent defect, quality or vice" (Hague Protocol), the Rio text had "special nature, latent defect or inherent vice," a mere *chassez-croisez* of legal obscurities. At The Hague, the question of whether the new paragraph should and does allow the carrier to contract away his liability for negligence in case of damage resulting from inherent defect, quality or vice received considerably more attention. However the discussion did not result in any conclusion.

A Swedish proposal stated that the carrier would be liable, notwithstanding an exemption clause as referred to in the new paragraph, "if it

[1] 1 Rio Session 77 (1953). Article 15 (7) contained a new formula for the willful conduct provision now contained in Article 25 of the convention.

[2] *Id.* at 133. Following the objection from the French delegate directed against the inclusion of "fragile articles," the U.K. delegate dropped this part of the U.K. proposal (137).

[3] *Id.* at 172.

[4] *Id.* at 278.

is proved that he or his servants or agents have caused or contributed to the loss or damage by negligence."[5] The Netherlands proposed a somewhat different text which would not impose on the shipper the burden to prove the carrier's *negligence,* but only that of proving that an outside cause had contributed to the damage. It would then be up to the carrier to prove, in accordance with Article 20, that he had taken all necessary measures to avoid the damage: "provided that, notwithstanding any such clause, the carrier shall be liable, subject to the provisions of Article 20, if it is proved that the damage did not solely result from the special nature, latent defect or inherent vice of the cargo."[6] Under this proposal the shipper could, for example, claim damages on the evidence that the loss resulting from the inherent defect, etc., was caused by an unwarrantable delay in delivery of the goods. It would then be up to the carrier to prove that he should not be held liable for the delay in accordance with Article 20. Under the Swedish proposal, the shipper would have had to prove the carrier's negligence with respect to the delay.

A U. S. proposal was aimed at placing the full burden of proof as to the absence of the carrier's negligence on the carrier. The result was to be obtained simply by inserting the word "solely" or "exclusively" in the Rio text, which then would read "provisions governing loss or damage resulting *solely* from the special nature, etc."[7] A similar suggestion was made by the German delegate.[8]

When a vote was taken on the now joint Swedish-Netherlands proposal to add a proviso with respect to damages resulting from outside causes, the proposal was defeated 20 to 8. This still did not make it clear whether the Conference intended to allow the carrier to exempt himself from liability for negligences in cases of damages resulting from inherent defect, etc., because the votes against the Swedish-Dutch proviso probably could as well be explained by a desire to allow the carrier such a contractual freedom, as by the idea that the proviso was not necessary for excluding the cases of carrier's negligence from the ambit of the new paragraph. In a last minute attempt to have the Conference at least state its views on the meaning of the adopted text, the Netherlands delegate declared that he understood the new paragraph to permit the carrier also to exclude his liability for negligence in the cases referred to in the Article. Other delegates were opposed to this interpretation. The U. K. delegate then intervened by saying that "he wondered what purpose was served by these declarations." One would think that the courts which in future must make a choice between the various possible explanations of Article 23, paragraph 2, will have no difficulty in answering *that* question.

The failure of the Legal Committee and the Conference as a whole to resolve the question of whether the new paragraph allows a carrier to contract away his liability for negligence is not surprising when viewed

[5] 1 Hague Conference 108 (1955). See also 2 Hague Conference 177.

[6] 1 Hague Conference 109 (1955). The proposals of Sweden and the Netherlands were later combined in 1 Hague Conference 157.

[7] *Id.* at 108.

[8] *Id.* at 213. There the words "resulting from" are changed into "to the extent that they result from." In his explanation Dr. Riese said that as a result, "the same result as that of the combined proposal of Sweden, Belgium and the Netherlands would be achieved in a more simple manner." It is respectfully submitted that, assuming the German proposal would achieve its desired effect (see the criticism of the French and Mexican delegates at 213), an important difference as to the burden of proof would result. This point was also overlooked by the Mexican delegate at page 211.

in historical context. As noted above, the paragraph was adopted from the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea which has a long history of disputed interpretation. In a Protocol to that Convention the High Contracting Parties were allowed to establish that in the case of damage resulting from inherent defect, quality or vice, the holder of the bill of lading may prove the personal fault of the carrier or the fault of his servants or agents. Various countries' legislative bodies, following the Brussels Convention, have made it clear that the defense offered by the legal provision on damage resulting from inherent defect, quality or vice does not extend to cases of negligence. In those countries where this has not been done, the question whether the same solution should or should not be accepted is still a matter of controversy.[9] This, too, should have been a warning against using the Brussels formula without clarification. Curiously, however, most delegates thought that they exercised caution by borrowing from a well known international convention of long standing. Well known indeed, but well known, too, as a source of long standing controversies. To trust blindly the wisdom of the drafters of the Brussels Convention was probably more an exercise of wishful thinking than of caution. But even if the borrowed Brussels formula were non-controversial in its own context, that would not mean that it offers also a clear and sound solution for the Warsaw Convention. In the Brussels Convention the provision forms part of the defenses offered to the carrier as a matter of law. In the Hague Protocol it is an exception to the principle that the carrier cannot by contract exempt himself wholly or partially from the liabilities imposed by the Convention. These are quite different things, but the main difference seems to have escaped the attention of most of the delegates.[10] The new paragraph 2 of Article 23 does not offer a defense to the carrier; it merely removes the legal bar of Article 23 against contractual exemption clauses in so far as these are concerned with loss or damage resulting from inherent defect, quality or vice of the cargo carried. This means that whenever a contract of carriage contains a provision governing loss or damage resulting from inherent defect, quality or vice, the validity of such a provision cannot be established by invoking Article 23. In order that the new paragraph have the same meaning it has in the Brussels Convention, it should be added to Article 20 or perhaps to Article 21. As it is now, Article 23, paragraph 2 is only concerned with the validity of certain contractual exemption clauses, whereas the original provision in the Brussels Convention deals with the legal liability of the carrier. The arguments used in connection with the legal effect of the provision in the Brussels Convention in case of the carrier's negligence, are of doubtful value when applied to the construction of the Hague Protocol.

Suppose the conditions of carriage contained the following clause: "in no event shall the carrier be liable for damage resulting from inherent defect, quality or vice of the cargo carried." The only question to be answered under Article 23, paragraph 2, would be whether this clause

[9] An extensive and valuable, yet somewhat prejudiced, discussion of this controversy is to be found in the recent book on the sea carrier's liability. Royer, Hoofdzaken der Vervoerdersaansprakelijkheid in het Zeerecht, Zwolle, 250 (1959).

[10] A clear example of this confusion is offered by the intervention of the Spanish delegate at 1 Hague 211 (1955).

is a "provision governing damage resulting from inherent defect, quality or vice of the cargo" as referred to in Article 23, paragraph 2. If so—and it seems difficult to deny it—paragraph 1 of Article 23 does not apply to such a clause in the Conditions of Carriage. Assuming for the moment that, as a consequence, the clause must be held valid, the next thing one must do is to determine whether the contract cluase should be construed to apply also to cases where negligence on the part of the carrier has contributed to the damage. More than likely this would be the correct interpretation in view of the initial words "in no event."

Should one reason in another manner, by asking first whether the exemption clause is meant also to apply to cases of carriers' negligence? If so, and if such application to cases of negligence were determined then the clause is not a provision as referred to in Article 23, paragraph 2, "governing damage resulting from the inherent defect, etc." This requires an interpretation of the words "loss or damage resulting from," etc. which, to put it mildly, does not impose itself on the basis of an unprejudiced reading. It is evident that—whatever theory of causality one prefers—there always will be other facts or circumstances besides the inherent defect or quality of the goods, will have played an essential part in causing the damage, whether it be the outside temperature or the humidity, air pressure or the movement of the goods, etc. Perhaps it will be argued that damages can only be said to result from the inherent defect, etc. of the goods, if they do not at the same time result from facts or circumstances for which the carrier is liable. Of course, Article 23, paragraph 2 does not say anything about that, but assume for the moment that this is true. What are the facts or circumstances for which the carrier is liable under the Warsaw Convention? The answer is given by Article 18, in which it is said that the carrier shall be liable in the event of the destruction or loss of, or of damage to, any goods, if the occurrence which caused the damage took place during the transportation by air. This does not bring us very far; damage resulting from inherent defect, etc., for which the carrier would, in principle, be liable under the Convention, necessarily implies an occurrence for which the carrier is made liabile by Article 18. Thus the newly added paragraph would have no meaning at all. It may be pointed out that the same reasoning could not be followed under the Brussels Convention. There, a number of well defined positive obligations of duty are imposed upon the carrier. The proposition that, whenever the carrier's failure to satisfy these obligations has contributed to the damage, such damage should not be considered to have resulted from the inherent defect, quality or vice of the goods, would not take away all effect of the legal defense offered with respect to such damages. Here again one sees the danger of transplanting a single phrase of one legal text into an entirely different one.

Perhaps one might argue that the occurrences for which the carrier bears liability should not be determined by Article 18 alone. However, this article when read in combination with Article 20, paragraph 1, holds that the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. The carrier becomes liable therefore when his failure to take such precautionary measures results in damage to goods. Applying this to the interpretation of Article 23,

paragraph 2, one would get this result: damages should only be considered to result from the inherent defect, quality or vice of the goods, if no failure on the part of the carrier to take the necessary measures to avoid the damage has contributed to the damage caused. Further, a provision in the contract of carriage should only be considered to govern such damage to the extent it would be applied outside such situations.

Again, this would deprive the new paragraph, introduced to meet allegedly urgent needs of civil air transportation, of any effect it could have. In order to prove the validity of the contract provision, the carrier would have to establish first that the damage did not result from any failure on his part to take the necessary measures for its avoidance. But once having done that, he would not need to invoke the contractual exemption clause, for he would already have offered a complete defense under Article 20 of the Convention.

Perhaps, to allow some meaning to the new paragraph, one can argue that it only purports to allow the carrier, by a provision in the contract of carriage, to shift the burden of proof concerning his negligence to the claimant when damage resulted from inherent defects, etc. However, there is nothing in the text to support such a proposition. *If* one assumes that the words "resulting from" imply that there should not be a concomitant cause for which the carrier is liable, it is hard to understand why the carrier would have to prove that the damage resulted from an inherent defect in order to be able to invoke the contract clause. For then the shipper must prove that negligence of the carrier was also a cause of the damage. Such an "interpretation" of the new paragraph is simply a way of saying that one would prefer such a rule. One cannot say that any other interpretation is less valid. There is nothing nonsensical or palpably unjust in allowing the parties to contract to let the extra risks arising from the inherent defect, quality or vice of the goods be borne by the shipper even in case of negligence of the carrier. Nor is a contract unjust which provides that goods requiring special care, because of their nature or inherent defects, to be carried by the carrier without his being liable for a failure in providing the special care required. Whether this is the most desirable solution is a different thing. However as long as the freedom to contract away liability (and the new paragraph purports to restore that freedom for a restricted number of cases) is not considered immoral. One cannot say that taking the new paragraph at its face value would lead to clearly unacceptable results.

Nor does the drafting history lead to a different conclusion. The only impression one obtains from reading the minutes of the Rio Session of the Legal Committee and those of the Hague Conference is that of confusion and of unwillingness to take a clear stand. The original proposal of the new provision, without any doubt, was intended to allow the carrier to contract away liability in case of his negligence. The French delegate was opposed to such almost unlimited freedom to contract out of liability. Further, he pointed to his domestic legislation which only permitted contractual exclusion of liability with respect to faults of the flying personnel or to risks of the air.

A Working Group was then appointed to consider precisely from what types of damage to animals or to perishable goods the carrier should be entitled to protect himself. It was also to consider the Swedish proposal.

Presided over by the U. K. delegate, who had made the original proposal, the Working Group produced the new formula. It failed to indicate the effects intended in case of carrier negligence.[11] Afterwards, proposals were made to add a proviso making it clear that, notwithstanding an exemption clause as referred to in the new paragraph, the carrier would be liable if it was proved that he had been negligent or had not taken all necessary measures to avoid the damage. These proposals were defeated. It is true, that various delegates had said that they thought the addition superfluous. But others expressed a different opinion. An attempt to get a clear statement of intention failed; the question was "wilfully" left for the courts to interpret. This means that the courts, in the absence of any guidance to be obtained from the drafting history, can only look to the text of the paragraph within the context of the Convention. The fact that the wording of the new paragraph was taken from the Brussels Convention does not mean that it should be construed in the same way as in the Brussels Convention. It plays a different part in the Warsaw Convention from the part it plays in the Brussels Convention. Since the arguments used in attaching one or the other construction to the provision in the Brussels Convention have no bearing on the interpretation of the Warsaw Convention, it is also different. The conclusion must be that, as a consequence of the added paragraph, Article 23 does not apply to exemption clauses "governing damages resulting from inherent defect, quality or vice of the cargo," irrespective of whether negligence on the part of the carrier has been a concomitant cause of the damage.

Does this mean that the new paragraph has established the validity of this limited group of exemption clauses. It certainly does not say so. What it does say is only that paragraph 1 of Article 23 shall not apply to these clauses. So their alleged invalidity cannot be based on that provision of the Convention. But whether it could be based on principles of applicable national law is a different question. Since the Convention itself does not contain any other general provision concerning the validity of exemption clauses, *e.g.*, a provision which would exclude their application in case of wilful misconduct (Article 25 as amended by the Hague Protocol only deals with the applicability of the limits of liability specified in Article 22), one must assume that the validity of contractual provisions that are not forbidden by Article 23 may be governed by the applicable national law. True, the unification of the law—the aim of the Warsaw Convention—is somewhat weakened by this interpretation of Article 23, paragraph 2, but there are other fields which the makers of the Convention have left to the national laws. A discussion of what will be the applicable law in the various national legal systems as to the validity of exemption clauses with respect to the carriage of goods would go far beyond the scope of this essay.[12]

So far, little has been said about the exact meaning of the words "inherent defect, quality or vice of the cargo carried." The French and Spanish texts have "nature ou vice propre des marchandises transportées," "la naturaleza o vicio propio de las mercancias transportadas." As stated above, the words were taken from the Brussels Convention, that is to

[11] 1 Rio Session 138 (1953).

[12] See a discussion in Drion, Limitation of Liabilities in International Air Law, §§ 230-49 (1954).

say, the English words were taken from the English text (Hague Rules) of which the Brussels Convention was a translation. Curiously however, the French text ("nature ou vice propre") differs from the authentic French text of the Brussels Convention, which has "vice caché, nature spéciale ou vice propre." The simplified French and Spanish texts were partly based on the thought that "a vice caché" is always a "vice propre" so that it was not necessary to mention it separately. It was reasoned that, since it was difficult to say goods such as livestock and perishables have a more "special" nature than other goods, the adjustive "special" should be eliminated. The result is that, in the language of the Brussels Convention (French),[13] the terminology of the Hague Protocol is somewhat different from the Brussels text. According to the final clauses of the Hague Protocol the text in the French language shall prevail in the case of any inconsistency ("en cas de divergence") among the three texts. This does not mean, however, that the interpretation of Article 4, paragraph 2, subparagraph m of the Brussels Convention could be of no significance to the interpretation of Article 23, paragraph 2 of the Warsaw Convention. Indeed the phrasing of the latter provision was clearly and consciously inspired by the terminology of the Brussels Convention, on the assumption that after thirty years the interpretation of that Convention would have been sufficiently established by the courts and legal scholars.

It is generally accepted with respect to Article 4, paragraph 2, subparagraph m of the Brussels Convention that, in order to determine whether an inherent defect, quality or vice of the goods has caused or contributed to the damage, it is necessary to establish the degree of care required of the carrier, on the basis of Article 3 of the Convention. Only such damage which would have occurred whether or not the carrier gave all reasonable care required in carrying this kind of goods, may be said to have resulted from the quality or inherent defects of the goods. It is contingent on the assumption that the damage would not have occurred if the goods had been without such quality or inherent defect. Whether the "quality" or an "inherent defect" played a relevant part in causing the damage largely depends on the amount of care demanded from the carrier in the transportation of this kind of goods. Article 3 of the Brussels Convention contains a lengthy description of the care required from the carrier; the Warsaw Convention does not contain such a provision. Because of this and because the new Warsaw paragraph only purports to offer the carrier the chance to limit his liability, it becomes necessary to follow a somewhat different line of thought.

The new provision was introduced in view of the extra risks involved in carrying cargo such as perishables or livestock. Whenever transportation of certain goods, because of their quality, inherent defects or vice, requires special care from the carrier in order that the goods may safely arrive at their destination, Article 23 does not forbid the carrier from contracting away his liability for failing to provide the special care required. It could be said that the special nature of the goods is again

[13] According to the Minutes at 213, the U.K. delegate would have "recalled that it was the English text of the Brussels Protocol [sic] which was authentic." It seems improbable that this has actually been said, as the Brussels Convention has only been made up in one language—French. Probably it was only pointed out that the original text on which the Brussels Convention was based (the "Hague Rules" of 1921) was in English.

emphasized, although the word "special" was intentionally removed from the text. Actually, there *must* be some deviation from what is normal as to goods carried by air. If not, the door is opened to any exemption clause for the carriage of any goods, since the quality or nature of the goods is always an essential element in determining the kind of damages which the goods may suffer. If a shipment has been handled roughly and arrives in pieces, it is because of the breakable nature of the shipment. Had it been a shipment of gold, there would be no damage. The quality or inherent defect can only be said to have contributed to the damage, if normal cargo, not requiring special care, would not have suffered damage.

If one accepts this interpretation, one gets the following results. If a shipment arrives in damaged condition and the Conditions of Carriage contained a provision negating any liability whatsoever for damages resulting from inherent defect, quality or vice, the carrier can plead that he had taken all necessary measurements to avoid the damage (Article 20). He can also argue that the shipment required special care in order to arrive in good condition and that the damage was a consequence of some failure with respect to that special care. His latter plea will be accompanied by a claim that such comes within the ambit of the exemption clause permitted by paragraph 2 of Article 23.

In many cases the kind of damage for which compensation is claimed will make a prima facie case for applicability of the exemption clause. That will be particularly so with the carriage of livestock or perishables, the two categories of goods for which the provision was especially intended. (At a certain stage of the discussion the clause was limited to these two categories.)

The burden of proof as to the exemption clause being applicable to certain damage is on the carrier. Could the contractual provision be phrased in such a way as to shift the burden of proof to the party claiming damages? It is believed that the new paragraph 2 does not allow that. The general rule is that exemption clauses are invalid. The carrier who invokes an exemption clause must prove that it falls within the exception of the second paragraph.

It would be foolish to say that the interpretation here suggested is the only one which can be defended reasonably. Already at the Hague Conference different interpretations have been offered. The addition of the new paragraph to Article 23 introduces a source of litigation, without offering any sure protection to the carrier. The drafters of the new provision had hoped to solve all problems by borrowing their formula from an existing Convention, a kind of legal escapism which international conferences occasionally indulge in. For a number of delegates the formula was attractive because of its brevity. Verbosity certainly is a weakness in a legal text, a weakness most keenly felt perhaps by jurists from Latin tradition. But that does not mean that a short text is necessarily a sound one. Ironically, in this case the text which was preferred for its shortness was taken from that typical—and certainly not the most admirable—example of Anglo-Saxon draftmanship, the Brussels Convention on Bills of Lading. The analogous provisions in the continental conventions on the carriage of goods by railroad (the Berne Convention, usually called the C.I.M.) and on the carriage of goods by road (the

Geneva Convention of 1956, abbreviated as C.M.R.) are more lengthy, though more explicit.[14] They were drafted by continental lawyers in the continental legal tradition. If the new paragraph *had* to be taken from an existing convention, it might have been better to use the old Berne Convention on carriage by railroad as a model. It had already served as such when the provisions on the carriage of goods (especially those on the traffic documents) were drafted at the original Warsaw Convention.

In all fairness to the drafters of the Brussels Convention, it should be pointed out that on this particular point that Convention was better than its partial imitation in The Hague Protocol. This was so not only because the Hague text was based on a different principle (validity of certain exemption clauses) from that of the Brussels formula (legal defense), but also because not all of the relevant provisions of the Brussels Convention have been incorporated into the Hague Protocol. Thus, the Brussels Convention contains a definition of "goods," by virtue of which "live animals" are excluded from the application of the Convention (Article 1, subsection c). "Livestock" being one of the categories of goods for which the new paragraph to Article 23 was thought necessary, this deviation from the Brussels Convention is especially striking. Moreover, Article VI of that Convention gives the carrier full freedom to contract away all liability with respect to shipments other than "ordinary commercial shipments made in the ordinary course of trade . . . , where

[14] The Berne Convention (C.I.M.) contains the following provisions on this subject (Art. 28):
"Le Chemin de fer n'est pas responsable des dommages qui résultent d'une ou plusieurs des causes ci-après: [. . .]
d. danger particulier, soit de perte totale ou partielle, soit d'avarie, notamment par bris, rouille, détérioration intérieure et spontanée, coulage extraordinaire, dessication, déperdition, auxquelles certaines marchandises sont exposées par des causes inhérentes a leur nature; [. . .]
f. danger particulier que le transport entraîne pour les animaux vivants; etc. [see also g.]
§ 2. Lorsque, eu égard aux circonstances de fait, un dommage a pu résulter d'une ou plusieurs de ces causes, il y a présomption qu'il en résulte, à moins que l'ayant droit n'ait fait la preuve qu'il n'en résulte pas."
The Geneva Convention (C.M.R.) contains the following relevant provisions:
"Art. 17:
4. Compte tenu de l'article 18, paragraphs 2 à 5, le transporteur est déchargé de sa responsabilité lorsque la perte ou l'avarie résulte des risques particuliers inhérents à l'un des faits suivants ou à plusieurs d'entre eux: [. . .]
d. Nature de certaines marchandises exposées, par des causes inhérentes à cette nature même, soit à perte totale ou partielle, soi à avarie, notamment par bris, rouille, détérioration interne et spontanée, dessication, coulage, déchet normal ou action de la vermine et des rongeurs; [. . .]
f. Transport d'animaux vivants.
5. Si, en vertu du présent article, le transporteur ne répond pas de certains des facteurs qui ont causé le dommage, sa responsabilité n'est engagée que dans la proportion où les facteurs dont il répond en vertu du présent article ont contribué au dommage.
"Art. 18:
2. [similar to Art. 28, para. 2, of the Berne Convention]
4. Si le transport est effectué au moyen d'un véhicule aménagé en vu de soustraire les marchandises à l'influence de la chaleur, du froid, des variations de température ou de l'humidité de l'air, le transporteur ne peut invoquer le bénéfice de l'article 17, paragraphe 4,d, que s'il fournit la preuve que toutes les mesures lui incombant, compte tenu des circonstances, ont été prises en ce qui concerne le choix, l'entretien et l'emploi de ces aménagements et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données.
5. Le transporteur ne peut invoquer le bénéfice de l'article 17, paragraphe 4,f, que s'il fournit la preuve que toutes les mesures lui incombant normalement, compte tenu des circonstances, ont été prises et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données."

the character or condition of the property to be carried or the circumstances, terms or conditions under which the carriage is to be performed, are such as reasonably to jusify a special agreement," provided that no bill of lading or other negotiable document was issued.

The conclusion must be that, far from conforming itself to existing international legislation on the matter of carriage of goods, the Hague Conference has, with the new paragraph to Article 23, adopted an unique principle. Air law is hardly to be congratulated with this uniqueness. One must wish that carriers will refrain from making use of the opportunity offered to them by the new provision. But it would hardly be fair to blame them, rather than those who created the opportunity. One cannot help feeling that with this new paragraph a source of litigation has been introduced into the Convention, of which lawyers and air law reviews will be the main beneficiaries.

LEGAL PROBLEMS OF OUTER SPACE

By Professor Dr. Alex Meyer†

THIS paper is written for an issue of the Journal of Air Law and Commerce containing articles on legal subjects in honour of the 75th birthday of Professor J. C. Cooper. On this occasion it seems appropriate to remember that everyone who is dealing with the legal problems of outer space should be obliged to study the publications of Professor Cooper on this matter[1] a great number of which—because of their excellent quality—have been translated into German in the "Zeitschrift für Luftrecht und Weltraumrechtsfragen" edited by our Institute. Naturally this does not mean that there is agreement with all proposals of Professor Cooper. But his ingenious and clear arguments in which he treated some of the most difficult problems, always gave to all authors dealing with the same problems new and important insights.

I. Preliminary Considerations

The legal problems connected with the exploration of outer space are multiform though their relative importance and order of priority vary. The question of the treatment of human beings eventually existing on celestial bodies seems to present no need for practical solution at the

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[1] I mention among others the following publications: *High Altitude Flights and National Sovereignty*, IATA Bull. No. 13, p. 46 (June 1951), 1951 Int'l L. Q. 411, German translation in 1952 Zeitschrift für Luftrecht 237 (hereafter ZLR); *State Sovereignty in Space Development 1910-1914*, published on the occasion of Professor Dr. Alex Meyer's 75th birthday (December 15, 1954) in a booklet presented by friends, colleagues and students entitled: Verkehrswissenschaftliche Veröffentlichungen des Ministeriums für Wirtschaft und Verkehr Nordhein-Westfalen, Beitrage zum internationalen Luftrecht; *Air Law—A Field for International Thinking*, 4 Transport and Communications Rev. 1; *Legal Problems of Outer Space*, 1956 Proceedings of the Am. Soc'y of Int'l L. 85, German translation in 1956 ZLR 171; *Flight Space and the Satellites*, 7 Int'l and Comp. L. Q. 82 (1958), German translation in 1958 ZLR 175; *Missiles and Satellites—the Law and Our National Policy*, 44 ABAJ 317 (1958), German translation in 1958 ZLR 394; *International Control of Outer Space*, 1960 Zeitschrift für Luftrecht and Weltraumrechtsfragen 288 (hereafter ZLW) (together with German translation); *Additional Remarks*, 1961 ZLW 103 (together with German translation); *Self Defense in Outer Space and the United Nations*, Air Force Space Digest (Feb. 1962), German translation in 1962 ZLW 187.

moment though some authors have already dealt with this question.[2] Indeed we do not know anything about human beings living on other celestial bodies. Nor do we suppose that human beings exist on the other planets of our solar system. According to the opinion of experts, there are in the galaxy millions of celestial bodies similar to the sun around which planets may be in orbit. But the question cannot be answered whether human beings exist on these planets. The enormous distance between the earth and these celestial bodis make it impossible to find the answer to that question. The problem of the allocation of frequencies for communications with and among space vehicles is a question which has been designated as urgent. But this is a special matter the treatment of which should be left to experts in the field. The same should be true for the question of the safeguards to be taken against contamination of outer space or from outer space by microbes. A special "Committee on Contamination by Extraterrestrial Explorations" is dealing with this matter under the auspices of the "International Council of Scientific Unions." Legal problems also arise from the intended establishment of space platforms, conceived in 1952 by Wernher von Braun in his Mars Projects. They are stations of support to be established at a certain height in space, in order to supply and repair space craft which will fly directly from the space platform to a planet. These legal problems do not seem to be of particular actual importance as at the moment such space platforms do not exist. Certainly the establishment of such space platforms of support in outer space is to be considered lawful because outer space, as will be explained below, is a free area. On the other hand, space platforms themselves would be subject to the control of the State which established them. This State would therefore not be obliged to open these stations to public traffic so that everyone might land there. But if the State exercising control over such a station were to open it for general traffic, it would not have the right arbitrarily to refuse a landing.

II. Practical Problems

Legal problems of more importance and more practical reality are the following:

1. The legal status of outer space.
2. The use of outer space and of the celestial bodies therein.
3. The border line to be fixed between air space and outer space.
4. The legal treatment of spacecraft or parts thereof falling to earth in foreign States.
5. Liability for damages caused by spacecraft.

A. *The Legal Status Of Outer Space*

No controversy of importance concerning the legal status of outer space seems to exist any more. The nearly unanimous view is that outer space is to be considered a "free area" as the High Seas. The decisive reason for this point is the following: It might be impossible—even by drawing fictitious vertical borders—to establish in outer space a determined area above the borders of a State which would correspond to the respective

[2] See Haley, *Space Law and Metalaw—a Synoptic View*, Harv. L. Record, Nov. 1, 1956; German translation 1957 ZLR 59.

boundaries of a State on earth. The enormous distances between the surface of the earth and outer space make it impossible to determine whether events in outer space happened in an area corresponding to a certain State on earth, even without taking into account the rotation of the earth. The extension of sovereignty of a State into outer space does not seem feasible.

B. *The Use Of Outer Space And Of The Celestial Bodies Therein*

1. Of course the fact that States cannot exercise sovereign rights in outer space does not preclude other activities of the States in this free area, particularly the exploration of outer space. Activities of the States are also normal on the High Seas. Neither does the fact that outer space is to be considered a free area mean that it should be in a condition of lawlessness and anarchy. Just as legal rules exist for navigation on the High Seas, laws must be made for outer space to be governed by laws which provide a legal order therein. But the legal rules to be formed for outer space cannot be based on the sovereign rights of a State in outer space. They can only be established by an international agreement concluded on earth. In my opinion the law of outer space will therefore not be an extraterrestrial law, as has been asserted, but a terrestrial law determined for the human beings on the earth undertaking flights into outer space. Naturally this law must consider the particular conditions of outer space. As regards the nature of the activities of the States in outer space, the United Nations as well as nearly all States, particularly the United States of America and the Soviet Union, have repeatedly declared that the use of outer space should be only a "peaceful" one. On the other hand, the question as to what is meant by the term "peaceful" has never been decided, neither by the United Nations nor by any State. Therefore, the question of how to interpret the term "peaceful" arises. Is it to mean "non-military" or "non-aggressive"?[3] In my opinion the term "peaceful" must be understood in the sense of "non-aggressive." To interpret the term "peaceful" in the sense of "non-military" would lead to the consequence that no military action could be "peaceful." But such interpretation would be in contradiction to all practice. Ordinary armed manoeuvres in time of peace which do not affect another State in a hostile manner are to be considered as peaceful in spite of the fact that all military manoeuvres finally serve for the preparation of war. Even the atomic tests undertaken by the United States of America and the Soviet Union in time of peace are to be considered as not constituting objectionable "aggressive" conduct. Therefore, in my opinion, neither can the ordinary use of reconnaissance satellites launched in peace time be signified as non-peaceful in every case. Such satellites have a military connotation but at the moment of their launching in peacetime they have generally no aggressive conduct. As far as I know, balloons or aircraft ascendets in the air have never been considered in peacetime as "non-peaceful" objects, though they, too, have the capacity of observing the surface of the earth. The possibility of viewing the surface of the earth and of examining the events happening there with appropriate instruments is an unchangeable fact connected with all kinds of instruments launched into the space

[3] The problem was discussed in detail in the paper given by N. Kittrie before the Fourth Colloquium on the Law of Outer Space at the XIIth International Astronautical Congress, Washington, October, 1961.

above the earth. It seems impossible to consider the use of all these instruments as "non-peaceful" in every case. On the other hand, exceptional cases may exist in which the use of these instruments has to be considered as "non-peaceful." If one agrees that the ordinary use of instruments launched into space above the earth (reconnaissance satellites included) cannot be considered as "non-peaceful," only because they have the capacity for observing the surface of the earth, no action undertaken under the concept of self-defense would be possible in these cases, independently of the question as to how Article 51 of the United Nations Charter is to be interpreted.

2. With respect to the use of the celestial bodies, the principal question is whether a celestial body can be occupied by a State. The question has to be answered in the negative. First of all, the merely symbolic hoisting of the ensign of a State on a celestial body can never be considered sufficient for establishing an occupation. The establishment of sovereignty rights on a stateless place needs an *effective* occupation. This means that the stateless place must be taken into possession with the intention of exercising actual and permanent control, and this would only be the case if the occupying State established such installations in the territory concerned as are necessary to assure the exercise of an exclusive sovereignty. For this reason, the planting of the national emblems of the Union of the Soviet Socialist Republics on the moon by a Soviet cosmic rocket on September 14, 1959, was not sufficient to establish territorial rights of this State on the moon. This was also the view of the Soviet Union. It declared immediately after the rocket had reached the moon that it would not make any territorial claims to the moon as a result of the landing of its rocket there. However, the first condition of the occupation of a territory is that such territory be capable of being occupied at all. It is extremely doubtful whether celestial bodies fulfill this condition. In my view, it has rightly been stated that no State can raise any territorial claims to any other celestial body, since outer space and the celestial bodies therein represent a *res omnium communis*, serving all the members of the human society, and not a *res nullius*.

C. *The Border Line To Be Fixed Between Air Space And Outer Space*

As regards the boundary to be fixed between air space and outer space, it cannot be doubtful that such a border line must be fixed at a future time. But the establishment of this border line will become really important only when space traffic substantially increases. The border line will be necessary to make possible a clear decision as to whether a certain act on board a spacecraft occurred while still within the sovereign area of a State or within the free area of outer space. At present, however, a real traffic into outer space does not exist. Even today one can agree with the view expressed in the 1959 Report of the Ad Hoc Committee of the United Nations[4] that "the determination of precise limits for air space and outer space does not present a legal problem calling for priority consideration at this moment." In considering the height to which the border line between air space and outer space is to be drawn in the future, one must take into consideration, on the one hand, that it will not be possible to draw geographically or topographically an exact border line due to

[4] United Nations General Assembly, July 14, 1959, A 4141, p. 68.

the irregular shape, both of the earth and of the atmosphere. On the other hand, in a technical and medical respect typical conditions of outer space may exist at altitudes belonging to the air space. Therefore, the border line can at some future time only be fixed numerically by an international agreement of the States, even if the limit provided for between air space and outer space should not exactly correspond to the geographical or topographical facts. As a final decision on this matter will be influenced by political, economic, scientific and military factors, experts on these matters should be heard before any final decision.

D. *The Legal Treatment Of Spacecraft Or Parts Thereof Falling To Earth In Foreign States*

On the occasion of the hearings in the United States of America before the "Select Committee on Astronautics and Space Exploration,"[5] the legal adviser of the State Department, Mr. Loftus Becker, stated the following:

> As respects the ownership of a space vehicle returning to earth, some commentators have suggested that at least as respects unmanned space vehicles, the appropriate analogy is a bullet-ownership of which is abandoned by the act of firing. An alternative rationale would be that any such vehicle entering the airspace of a sovereign State without the latter's permission should be placed in the category of smuggled goods.

These views seem to me to be erroneous. Certainly the ownership of a *bullet* is given up at the moment of firing, because it will itself be destroyed in the moment of destroying things. Contrary to this, a spacecraft with valuable instruments or even with animals is launched with the hope that it will return to earth, and the State or other entity which launched it never has the idea of giving up the ownership of the spacecraft and the things therein. On the contrary, the State is greatly interested in recovering them. Neither can one say that unmanned spacecraft or parts of these falling in the territory of a foreign State could be placed in the category of smuggled goods. Smuggled goods are those which somebody tries to send into a foreign country with the intention of not paying the required duties. Spacecraft are not launched for this purpose.

According to maritime law, stranded goods are always given back to the owner, provided the owner is found. Only in cases where he cannot be found can the country on whose beaches such goods have been thrown claim possession. Therefore, the owner of spacecraft remains its owner after its launching and has, according to international private law, the right to claim the restitution of the spacecraft or parts thereof from anyone who has taken them in possession. The realisation of this right would be impossible only if provisions of public law would hinder it, for these provisions would prevail. Certainly there exists the generally recognised provision of Article 1 of the Chicago Convention that the States have the complete and exclusive sovereignty over air space above their territory so that flights into the air space above these territories are only possible with their consent. But as far as I know, no rule of international law exists which entitles a State generally to confiscate objects falling on its territory accidentally from the space above it. A possible exception could exist when an offence would be suspected, *e.g.*, in the case of spying.

[5] Eighty-fifth Congress, 2d Sess. H.R. 11881, p. 1275.

The landing State must, therefore, be obliged to return unmanned space vehicles and their contents, landed accidentally on its territory, to the launching State.

E. *Liability For Damage Caused By Spacecraft*

The Legal Committee of the German Scientific Society for Air Navigation of which I have the honour to be the chairman, dealt with the question of liability for damages caused by spacecraft at its meeting of June 15, 1962, in Munich.

The Legal Committee recommended the application of the following principles:

1. The liability for damages caused by spacecraft should be regulated as a part of a general convention concerning the conditions under which outer space flight shall be licensed.

2. The Convention should apply not only to damages caused by spacecraft in flight to the surface of the earth, but should also cover damages caused by spacecraft in air space to aircraft and persons or goods therein and in outer space to other spacecraft. The application of the rules of the Convention to damages caused by spacecraft in air space seems appropriate as the damages to which aircraft are exposed by spacecraft are not inferior to the damages to which persons and goods are exposed on earth.

3. The Convention should apply to private aircraft as well as to State aircraft.

4. The Convention should apply to damages caused in the territory of a Contracting State (earth, water, air space) or in a free area (High Seas, stateless territory, outer space) by a spacecraft licensed in the territory of a Contracting State. It does not seem necessary that the person who suffers damage should have the nationality of a Contracting State.

5. As to the type of conduct giving rise to liability for damages caused by spacecraft in flight to the surface of the earth or in air space, the principles of the Rome Convention of 1952 should be applied. Therefore, no proof of fault should be required. Compensation should be paid upon proof only that the damage was caused by a spacecraft in flight or persons or things falling therefrom, or by collisions between aircraft and spacecraft. In case of collisions between two or more *spacecraft*, the proof of fault should be required for compensation as anyone operating a spacecraft has to realise that in case of collision with another spacecraft he himself has to suffer the damage if he cannot prove fault on the part of the other operator or of the servants and agents of the latter.

6. Contributory negligence of the person who suffers damages or of his servants or agents reduces the compensation or excludes it entirely.

7. As regards the person liable for damages, the operator of the spacecraft causing damage (in case of collisions, the operators of each spacecraft) shall be liable. The liability should be limited to a certain amount. The operator should be obliged to be insured in a satisfactory manner up to a certain limit to be fixed by the Convention. Similar to Article 15, alinea 4, of the Rome Convention of 1952 any of the following securities shall be deemed satisfactory instead of insurance:

a. A cash deposit in a depository maintained by the Contracting

State where the spacecraft has been licensed or with a bank authorised to act as a depository by that State;

b. a guarantee given by a bank authorised to do so by the Contracting State where the spacecraft has been licensed, and financial responsibility of which has been verified by that State;

c. a guarantee given by the Contracting State where the spacecraft has been licensed, if that State undertakes that it will not claim immunity from suit in respect of that guarantee.

According to the example given in the German Atomic Law (Article 38) and in the Euratom draft of an additional Convention to the Convention of Paris on third party liability in the field of nuclear energy (July 29, 1960), framed by the organization for European Economic Corporation, in case that the damage is higher than the foreseen guarantee, the State which has licensed the spacecraft shall be subsidiarily liable for the compensation of the higher damage.

8. Actions against the operator of private spacecraft, so far as the claim does not exceed the limits of the insurance or the guarantee, should be brought before the competent Court of the place where the damage occurred. Actions for damages caused in stateless territories are to be brought before the Court of the State of which the claimant is a national. The International Court of Justice should decide on appeal. Actions against the operator of a State spacecraft and of private spacecraft, as far as the claim exceeds the limits of the insurance or guarantee, should be brought exclusively before the International Court of Justice.

Comparing the principles laid down by the Legal Committee of the German Scientific Society for Air Navigation with the Memorandum delivered by Professor Cooper to the Third Colloquium on the Law of Outer Space in Stockholm in 1960, one can state that these principles are to a high degree in accordance with the proposals of that Memorandum. Differences exist only with respect to the following points:

1. Professor Cooper answers in the affirmative the question whether compensation for damages caused by spacecraft to third persons on the earth should be excluded, as provided by the Rome Convention for damage caused by aircraft, if the damage results from the mere passage of the spacecraft through outer space in conformity with provided traffic regulations. In other words damages caused by noise could be excluded from compensation. The views of the members of the Legal Committee of the German Scientific Society for Air Navigation were divided on this question. So the Committee resolved to leave this question open to further discussion. In my opinion the provision of the Rome Convention should not be taken over by a Convention concerning spacecraft. It would be very difficult to state whether a spacecraft was flying in conformity with the regulation provided for outer space.

Professor Cooper in his Memorandum at Stockholm proposed that the domestic State of the person damaged should at first grant compensation within the scope of the liability limits of the Convention and subsequently exercise a right of recourse. The German Legal Committee was opposed to such a regulation as it would be necessary for the domestic State of the person damaged to have itself sued and to have certified the justification of the claims by legal procedures, otherwise such a State would

run the risk that its claims of recourse would be rejected by the State of the person having caused the damage. Therefore the German Legal Committee proposed to channel the liability to the operator of the spacecraft to a certain maximum, and then to require the Contracting State which licensed the spacecraft to assume liability for the damages in excess of the limits. This regulation was, as already explained, patterned after the example given in the German Atomic Law (Article 38) and in the Euratom draft of an additional Convention to the Convention of Paris on third party liability in the field of nuclear energy (July 29, 1960) framed by the Organisation for European Economic Cooperation.

It is to be hoped that Professor Cooper will be able to continue his productive work concerning Air and Space Law for a long time to come.

JOHN COBB COOPER AND McGILL'S INSTITUTE OF AIR AND SPACE LAW

By A. B. Rosevear†

PROFESSOR John Cobb Cooper has enjoyed a much longer and active career in the profession of the law than is accorded to most men. He has been a railway and airline lawyer, an adviser to his government, a writer, a professor and a lecturer. Not being entirely satisfied with aviation law as his sole field of endeavour, he has, since reaching three score and ten years, become the father of the law of outer space.

I. The Founding of an Air Law Institute

Professor Cooper will reach his seventy-fifth birthday on September 18, 1962. As one of his friends I now wish to pay tribute to him as an international lawyer and personality. Professor Cooper's activities, during a long career, have been many and varied. In this article, however, I shall confine myself to the story of the founding and the subsequent work of Professor Cooper as Director of McGill's Institute of International Air Law.

I first met Professor Cooper in Geneva in May of 1948, where we were attending the meeting of the Legal Committee of the International Civil Aviation Organization (ICAO), which was engaged at that time in drafting the Geneva Convention (International Recognition of Rights in Aircraft). Neither of us realized that our paths would cross many times in the succeeding years, both professionally and at friendly luncheons and social events. In 1948 neither Professor Cooper nor I had any thought of founding an Institute of International Air Law at McGill University, in Montreal, Canada. Little did we know at the time that Professor Cooper was destined to become one of the founders of the Institute and its first Director and that I would eventually be one of his successors.

In 1946 the assembly of the Provisional International Civil Aviation Organization met in Montreal and in accordance with the power vested in it chose Montreal as the permanent seat of ICAO.[1] The International

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[1] See Article 45 of the Chicago Convention.

Air Transport Association (IATA) at about the same time also made Montreal its permanent seat. These decisions had the effect of making Montreal the world headquarters for international civil air transport. If, therefore, an air law institute were to be established, Montreal seemed to be the logical place for it.

In 1951 Professor Cooper, who was then acting as Counsel for IATA, representatives of ICAO, IATA and of McGill University held a series of conferences on the subject of establishing such an institute at McGill University, where air law would be taught to graduate students and original research work in the subject would be undertaken by competent persons. In due course the Institute of International Air Law was founded, Professor Cooper was appointed its Director, and its first session commenced in the autumn of 1951. Professor Cooper brought to the Institute a vast knowledge of air law and air transport problems, sound judgment and administrative experience.

When the Institute was founded it was sponsored by an advisory committee consisting of John P. Baldwin of Canada, Major K. M. Beaumont of the United Kingdom, Professor John C. Cooper, Maître André Garnault of France, Sir William P. Hildred of IATA, Dr. Luis Machado of Cuba, Mr. E. T. Nunneley of the United States, Dr. E. P. Warner of ICAO and Mr. R. O. Wilberforce, now the Honourable Mr. Justice Wilberforce, of the United Kingdom. All these gentlemen are well known in aviation circles throughout the world.

As a result of Professor Cooper's efforts and with the support of Dr. F. Cyril James, Principal of McGill University, the Rockefeller Foundation and the Carnegie Corporation of New York agreed to make grants of money to provide fellowships for worthy graduate students attending the Institute. These fellowships secured the success of the Institute in its formative years.

II. The Students Arrive

There were twelve students in the 1951-52 class of the Institute. They came from Canada, Egypt, England, Formosa, Greece, Italy and the United States. The 1952-53, 1953-54 and 1954-55 classes had an average attendance of fifteen students. They also came from many parts of the world and the international character of the Institute's work was, therefore, well established and has been maintained ever since.

Realizing the hazard of omitting references to students who merit recognition, I cannot refrain from mentioning that, during the first four years of the Institute's existence, among those in attendance were Professor Huibert Drion of the University of Leiden, Professor Kurt Grönfors of the School of Economics, Göteburg, Sweden, Ian E. McPherson, now General Attorney of Trans-Canada Air Lines, Professor Ming-Min Peng of National Taiwan University, Dean J. E. Richardson of the Faculty of Law, School of General Studies, Camberra, Australia, and others.

III. The Courses of Study

In 1953 Professor Cooper wrote an article for the Journal of the Society of Public Teachers of Law respecting the Institute of International Air

Law. After explaining his concepts of the meaning and scope of air law he wrote as follows:[2]

> The Institute, therefore, starts with the premise that air law comprises the body of legal principles and rules, from time to time effective, which govern and regulate:
> First:
> (a) Flight-space;
> (b) Its relationship to land and water areas on the surface of the earth;
> (c) The extent and character of the rights of individuals and states to use or control such space for flight or other similar purposes.
> Second:
> (a) Flight;
> (b) The instrumentalities with which flight is effected, including their nationality, ownership, use or control;
> (c) The surface facilities used in connection with flight, such as airports and airways.
> Third:
> (a) The relationships of every kind affecting or between individuals, communities or states arising from the existence or use of the area of flight (flight-space), or the instrumentalities or facilities used in connection therewith or to make flight effective.
>
> Accepting for convenience the definition of international law as stated in 1927 by the Permanent Court of International Justice in the case of the S.S. Lotus, to the effect that "International Law governs relations between independent states," the Institute seeks to deal with public international air law as the body of legal principles and rules which are included in the general definition of air law stated above and which, at the same time, govern relations between independent states. The Institute has also sought to deal with certain subjects that may be classed as private international air law, such as the relations between air carriers and passengers, air carriers and shippers, air carriers and third persons on the surface, and other similar problems.
>
> Each year four basic courses are given which are required for all those admitted to the Institute. These courses may generally be described as follows:
>
> (1) Development of International Transport Law—its history since the fifteenth century; the development of the law of the relation of a state to its territory; the extent of the right of each state to control transport activities within its territory; historic controversies as to whether and to what extent usable space above the land and water territories of a state is part of the territory of that state; the legal status of usable space over the high seas and other non-sovereign surface areas.
>
> (2) Public International Air Law—the background, drafting and significance of the international conventions, which include many of the present concepts of air law, namely, the Paris Convention 1919, the Madrid Convention 1926, the Havana Convention 1928, and the Chicago Convention 1944; the development and content of the present system of bilateral agreements under which air carriers of one state are authorized to fly into the territory of another state; problems of jurisdiction to be applied to occurrences on board aircraft of one state when flying into or over the land territories of another state; general questions of the concept of nationality of aircraft and other flight instrumentalities.
>
> (3) Private International Air Law—a general consideration of conflicts of law applicable to the rights and liabilities of air carriers and the extent to which such conflicts have been or can be eliminated by international conven-

[2] Cooper J. C., "The Institute of International Air Law," (1952-54) 2 J. of the Soc. of Public Teachers of Law (New Series) 122.

tions, with particular reference to (a) the Warsaw Convention 1929 covering the relationship and liability of air carriers to passengers and shippers, (b) the Rome Conventions 1933 and 1952 covering the relationship and liability of air carriers to third persons suffering damage on the surface, and (c) the Geneva Convention 1948 dealing with title to and liens on aircraft; also an analysis of the standard conditions of carriage used by international air carriers and other similar problems.

(4) International Air Regulation—an analysis of the implementation of the Chicago Convention 1944 through the setting up of the International Civil Aviation Organization at Montreal; its practical handling of the authority given to it by the Chicago Convention looking towards the regulation of air navigation; its adoption of standards and recommended practices; the relation of its work to regulation of aviation in the several states of the organization.

Professor Cooper's programme of studies for the Institute was well conceived for, apart from changes made by his successors to suit their respective concepts of the emphasis which should be placed on particular aspects of air law, the courses are basically the same as they were in 1953, except for the addition of a course on the law of outer space.

Needless to say, the initial planning required to place the Institute of International Air Law on a sound basis, on top of the immense amount of work which went into the preparation of material for his lectures, speak eloquently of the energy and scholarship exhibited by Professor Cooper. The task would have daunted many younger men.

IV. Research Work and Publications

Professor Cooper, during his term as Director of the Institute of International Air Law, laid great stress on his students performing original research in and writing on air law subjects. As a result a number of papers written by students appeared in various publications. Professor Cooper himself managed, in addition to his many other duties, to write a number of articles which were published during his tenure of the Directorship. A list of the articles written by Professor Cooper and by his students is set out below.

Conclusion

Former students of the Institute will all remember Professor Cooper's wife, Martha, who died early in 1962. Mrs. Cooper was Professor Cooper's constant companion and helpmate, not only at home but on the many journeys to far off places, to which Professor Cooper was called in connection with his duties as Counsel for IATA. It is a tribute to his courage that he is carrying on alone but all his friends know how much he must miss the companionship of his devoted wife.

The Institute of Air and Space Law, as it is now known, represents only one of the many accomplishments of Professor Cooper. The past and present students as well as the Director and staff of the Institute of Air and Space Law extend hearty congratulations to Professor Cooper on his seventy-fifth birthday and wish him many more useful years in the work which he loves best.

APPENDIX

Publications of Professor Cooper 1951-1955

Aviation Cabotage and Territory: a research study of the Institute of International Air Law, McGill University, [1952] U.S. & Can. Av. R. 256.

Air Law—A Field for International Thinking. 4 Transport and Communications Rev. 1 (1951).

Canada and the Warsaw Convention. 13 Rev. du Bar. (Quebec) 68 (1953).

The International Air Navigation Conference, Paris 1910. 19 J. Air L. & Com. 127 (1952).

United States Participation in Drafting Paris Convention 1919. 18 J. Air L. & Com. 266 (1951).

Publications of Students 1951-1955

Drion, H.—Limitation of Liabilities in International Air Law, 317 pp. Thesis, McGill University, published by Martinus Nijhoff N.V., The Hague, 1954.

Fenston, J.—Res Ipsa Loquitur in Aviation. 1 McGill L.J. 209 (1952-55).

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Heller, P.P.—The Grant and Exercise of Transit Rights in Respect of Scheduled International Air Services, 213 pp. Published by the Air Department, Civil Aviation Administration, Wellington, New Zealand, 1954.

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Hesse, N.E.—Some Questions on Aviation Cabotage. 1 McGill L.J. 129 (1952-55).

Hughes, D.M.—Airspace Sovereignty over Certain International Waterways above Various Sea Areas, Canals and Straits, 19 J. Air L. & Com. 144 (1952).

MacBrayne, S.F. (Miss)—Right of Innocent Passage, 267 pp. Thesis, McGill University, published in part 1 McGill L.J. 270 (1952-55).

Martial, J.E.—State Control of the Airspace over the Territorial Sea and the Contiguous Zone, 30 Can. Bar Rev. 245 (1952).

Murchison, J.T.—The Contiguous Air Space Zone in International Law, 77 pp. Thesis, McGill University, published by the Department of National Defense, Ottawa, 1955.

Peng, Ming-Min—Le statut juridique de l'aéronef militaire, 244 pp. Thesis, McGill University, published by Martinus Nijhoff, N.V., The Hague, 1957. (Manuscript submitted in 1952).

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Toepper, A.—Comments on Article 20 of the Rome Convention of 1952. 21 J. Air L. & Com. 420 (1954).

CONTRIBUTIONS OF SPACE AND INTERPLANETARY LAW TO JURIDICAL SCIENCE*

By Aldo Armando Cocca†

FIFTEEN years ago in 1947, when the first seminar on aviation law was held in Argentina, we placed before the Faculty of Law and Social Sciences of Buenos Aires a different proposition, a novel request—the study of Law in the Fourth Dimension. Our position was to be based upon common and frequent observations of recent times, such as the warning of Paul Langevin—a pure and enlightened man who, in the opinion of Einstein, suffered greatly at the deficiencies and inequities of our institutions, and who firmly believed in the power of reason and of knowledge and who searched for the light of justice—that the vital feeling of progress permits us to discard the burden of antiquated learning, averring that inflexible dogmas cannot but disintegrate upon contact with contradictory events—weakening, when not completely distorting, those who experience these events. The research work involving a new phase of law such as the then new aviation law, required its own method of study. In other words it required a process of analysis, abstraction, comparison, generalization, induction and deduction, in order to attain its objective in its purest form. All of this in light of inventions and technical advances, so that the law scholar could not devote himself freely to pure academic speculation. Nothing could be worse than regressing to old juristic institutions because neither the aviation law of those days nor the space and interplanetary law of today have any real historical background worth mentioning. The philosophical content of the law was not developing sufficiently thus leading it to arbitrary reasoning. There was some justification for this at a time when aviation law—and no other previous juridical instruction—was confronting a most important factor, the factor of time, which has immense value.

Studies on that fourth legal dimension have progressed, especially since 1956, with the publication, by the VIIth International Aeronautical Congress convened in Rome, of our work, "Method for research on juridical problems posed by the conquest of interplanetary space." Mention should be made, on the merits, of some of the first theses on the subject, as, for example, one by a Philippino jurist, Restituto G. de Guzmán, "Juridical Problems of the Conquest of Space," which is one of the most extensive monographs known on this subject. In this thesis, considered on December 9, 1959, by a panel composed of Yanguas Messia, Luna Garcia, Castro Bravo and Zubizarreta Gutierrez y Azcárraga y Bustamante at the University of Madrid and classified by them as outstanding (cum laude), Mr. Guzmán asserts that "upon entering the era of astronautics, there is nothing else to do but to apply the theory of the Fourth Dimension to the law, as in the case of mathematics and physics, if one is completely to understand in all its extent, that is objectively, all the juridical trans-

* Translated by J. Air L. & Com. staff.

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cendence of the diverse phenomena and to develop the coresponding norms in accordance with it." Mr. Guzmán brings out the primary importance of what he calls the "immeasurable discovery" of Argentine juridical science. The memorandum written in May of 1958 and delivered to the Institute of High International Studies of the Sorbonne by Christos Papathanassion, an Athenian lawyer, doctor of law of the University of Paris, in order to obtain his diploma at that institution, also recognized the proposed methodology. In concluding these references to the first defenders and critical expounders of the Fourth Dimensional theory of the law, we must mention the lectures being delivered in Brazil since 1958 by Professor Luiz de Gonzaga Bevilacqua.

The fact that the purpose of this article is to honor an American professor impels us to state that at the convening in Washington of the IVth Meeting of the International Institute of Space Law in October of 1961, we outlined our theory of the Fourth Political Dimension in "The Legal Status of the Cosmonaut," carrying to its final conclusion the theory of Sigmund Neumann that in the 20th Century politics has acquired three dimensions: personal, national and international. We therefore maintained, reaffirming previous concepts, that in this space age politics has acquired a Fourth Dimension since it should be regarded from the viewpoint of a policy stemming from the interests of mankind.

The results of space explorations have impressed upon the jurists the necessity of searching for a method of law study which could follow this wonderful achievement of man. The law, which must be present in all voluntary acts, had been left behind. We asked ourselves then: How should human conduct be regulated when man leaves the earth? The press of all nations at the time of this space achievement spoke of a new world vision, a felicitous statement made on the birth of a new era at the 1950 International Conference called by the Institute of High Economic Studies at Sankt Gallen (Switzerland).

The jurist's concern was reduced to the difficulty of finding a method for the study of the new law. No single jurisprudential approach has reconciled technical progress with the necessity of giving the law a valid, totally scientific method. Neither rationalistic natural law nor dogmatic rationalism, nor exegetic empiricism, nor casuistic historicism, nor eclectic sociologism, nor existentialist egological theory were able to cope with the new problems of outer space travel.

A different method was necessary to face the elaboration of the new law, or better yet, the new vision of the law. There should be a new procedure to be followed to find and explain juridical truth; a methodology that would be not only mere logic, but also dialectic in this initial stage. It would be necessary once more to find a juridical reality which was inevitably drifting from legal science because of man's inability to comprehend legal phenomena in a context other than the one provided by the notion of limited time.

A simple analysis of the situation would show the presence of a factor, one that varies substantially. This is the time factor. In only a few minutes the astronautical invention and the man travelling within it leaves the earth and penetrates space. Would this cut away the juridical ties linking them to this planet just as the physical tie would be modified or made non-existent? The law would not merit consideration as a science

were it, in the face of such an event, to abandon man and deprive him of a juridical universe, in an unknown physical world.

Scientific intention orients the constructive spirit. Confronted with the imminence of the event that threatens to discredit law as a science, the jurist is forced to formulate a proposition. He cannot agree to, nor accept, that the law, being as it is the highest achievement of man, should disintegrate, nor that it should falter in the face of a technical event. The jurist has arrived at the conclusion that a method which meets the challenge of the progress of knowledge in other fields is required in order to study the juridical problems arising from space explorations. Therefore space and interplanetary law cannot be envisaged, without the aid of a Fourth Dimension.

Thus some of Einstein's theories may be applied in the juridical field, since his relativistic conception of the universe offers a solution at this crossroad in juridical knowledge which up to the present time has been limited to the earth and which today, as in the case of astronomy, transcends the universe.

It must be kept in mind that science is the pure expression of thought and that the conceptual consequences of Einstein's theories affect all human knowledge. The lack of conformity between reality and the slow progress of juridical knowledge was obvious. With the aid of the Fourth Dimension the chaotic state of juridical thinking can be reorganized in the same fashion that Einstein organized human thought and permitted the continued existence of laws which appeared to be doomed. The greatest merit of the theories chosen as a point of departure has doubtless been the advances in the recognition of reality. If juridical reality requires a method for its perception there is nothing more appropriate than to utilize those systems which are more advantageously proximate to all the preexisting methods.

The jurist's task is a continuous labor of spiritual construction, which progress demands that it rise to the higher levels of human knowledge. Thus, juridical knowledge can be established in its scientific category, in the same fashion as in the 19th Century, mathematics, natural science and historiography definitely became scientific segments of learning.

Today's jurist must elevate his knowledge to the degree reached by progress, and to conform it to the nature of his particular specialty without forgetting that the law, besides being a science, is also conscience. He must not be guided by a method which is appropriate to another science, nor submit to the timely and efficacious enunciations of other types of scientific learning. However, he cannot deny either the reality or the knowledge of man. The spatial era implies this widening of his knowledge and gives him the sole possibility, among those that are known and foreseeable, of advancing his knowledge up to the highest category of science.

Finally, we would like to indicate precisely the sense in which we use the term science. By scientific procedure we agree with Max Bense that it is a method of obtaining an authentic and demonstrable knowledge of the world in a gnoseological, existential, and sociological sense. A world manifested as nature, technology and history. Science is only revealed by words and by statements. It unfolds statements concerning the world, but it does not modify the world itself. Therefore we distinguish between

regarding the world as converted into tools by which we can modify and change the world itself. Technology, in its tremendous progress during the last decade, seems to have taken this task upon itself, unfortunately even including the destruction of the world. All contribution tending to direct the power of technology toward other worlds will improve life in this one, not only materially but also contributing to the serenity of spirit. Such has been our proposition, happily at this time shared and expounded at a conference of the Aeronautic Circle of Buenos Aires on April 25, 1956, that is, more than fourteen months before the beginning of the International Geophysical Year.

We shall not go on to bring out some of the consequences and to suggest a few forms of procedure presented by the application of the Fourth Dimensional method in fifteen years of doctrinary preparation. In the first place when the jurist intends to perfect a doctrine on space or interplanetary law, he must contribute all his science and his most profound juridical conscience. We prefer to refer to what is known as juridical sense as juridical conscience, with the clarification that it should be the expression of collective and not only individual juridical conscience.

Imitation, disguised as adoption of rules from other juridical disciplines or its methods should be immediately discarded. Adaptation at most would result in a partial success but it would fail in its definitive objectives. Polemics is preferable to facile success. The jurist would achieve nothing if he does not accept the premise that both space law and interplanetary law have effective existence in spite of the fact that very few norms exist beyond the realm of positive law. It is fortunate that it is so, for such a highly spiritual labor demands a mature procedure and discussion which would cut off inopportunely the sanction of the positive norm. The jurist in his ivory tower can rest assured, for it cannot be denied that these new legal forms are to be found in the minds of all peoples even though they have not arrived at a true state of collective conscience. They are in everyone's mind in their human sensibilities. They resemble a most up-to-date system of natural law which, while not transcending positive norm, retains all the illusion of spiritual aspiration. Its principles are paramount to any established law.

When studying the concepts and principles afforded by juridical knowledge the jurist must analyze the essential characteristics of the known systems, taking into consideration the present state of the collective consciousness and the factors which will assist in the improvement of human relations. Only thus can he create his own system, with complete quadridimensional freedom. Granted that space law does not offer that which scientists call "historical formation," much less juridical archeology, it fortunately demands the immediate formulation of concepts that will precede its positive enforcement as a dogmatic expression arising from a condition of general consciousness. So that the concept may precede its enforcement, it must arise from profound convictions, organic in their preparation and clearly expressed. However, it must not be believed that it is only the tool that enables the construction of space and interplanetary law. Neither the scientific conception of the law nor the application of a strict methodology obstructs the productive task of creative imagination, so important in all the forms of the new law. Methodology imposes harmony and more important the scientific result, the greater the clarity,

because reality, bounded by science, is the supreme harmony. Furthermore, it contributes metaphysics in equal proportion to the elaboration of space and interplanetary law, since institutional knowledge plays just as important a role as logic.

One must realize that space law does not result from juridical technology because it comes about as a consequence of technical achievement. Technology is the tool utilized to build with the concrete material offered only by juridical science. Technology, it is true, corresponds to a science, but it must correspond solely to juridical science. Juridical technology cannot be a branch of any other but juridical science. Space law formulates concepts of universal validity, it does not adapt itself to the results of an experience developed with the assistance of a science or art alien to the law. Because of the principle of juridical security demanded by the human community, once the concept is established the formulation of the rule must follow; then we can avail ourselves of the determined juridical technology or art, furnished by the principle which precedes the norm.

If the elaboration of concepts is more important to public than to private law, it is useless to emphasize its value in space or interplanetary law whose most salient characteristic is its Fourth Dimension in the physical universe and in the social world. Far from sacrificing the dignity of the law, this dignity is rooted in the elaboration of space law for it may not abandon its high level of idealism for any reason whatsoever, even when a sporadic technological advantage of a determined potential appears to impel the crystallizing of a new norm under the pretext that with realism one attains effectiveness. Such norm would have no other existence, no other importance than the very limited one of national law, for the State parliaments lack the competence to legislate in space because with such an attitude they would fall back into a positivism which is unworthy of the spiritual science.

The jurist's labor also offers that which is advantageous to spatial and interplanetary matters. In the first place he does not have to invent anything except to disclose and express the juridical reality provided him by his scientific knowledge of physical reality. It is evident that there are many *a priori* conceptions on all interplanetary law but these will not be merely speculative if it does not revert to its experimental basis, which becomes increasingly unnecessary to scientific progress. The jurist may know the true facts without previous experience because this truth derives from the harmony of the universe. As soon as he reaches truth and certainly, not before, the jurist must undertake doctrinal elaboration, and he must not delay since he possesses the incontrovertible postulate of the juridical phenomenon.

Another advantage is that the space lawyer has a demonstrable fact in his favor: a sole, unique and inalterable human nature which neither the centuries nor political tendencies have managed to alter. It is a nature proper to peoples—which we separate into nations because these are the creations of political order—who love justice as a tangible reality and not as a metaphysical or circumstantial abstraction—they love freedom, community life, harmony and they sense the fundamental principles of natural law.

There is one third advantage: the lawyer who devotes himself to these studies will always be followed, for the formulators of the law in all peoples, according to Ihering, speak the same language whatever their

idiomatic or educational differences in all countries and at all eras. Space law at least has this essential quality of a sole language derived from a sole conception and an identical evaluation of concepts.

Finally, a happy event has been foreseen, if not yet demonstrated: doctrine tends to acquire, with the development of space and interplanetary law, the great importance that Roman law possessed, that is, the value of the norm when it is uniform. Perhaps by this unused path the jurist once again will take an active part in the life of the State and reinstate a power usurped by the politician and apply his opinions as bases for decisions, in the same manner as jurisprudence or the law itself.

THE INTERNATIONAL ASTRONAUTICAL FEDERATION AND THE USE OF SPACE FOR PEACEFUL PURPOSES*

By Antonio Francoz Rigalt†

MAN'S study of space is age-old.

However, until very recently these studies were confined to observations and measurements of celestial bodies in their relation to earth.

Gigantic telescopes, aerostatic balloons and airplanes have played an important role in these scientific studies. The long-range rocket, equipped with instruments, was developed in Germany, Russia, the United States, France, Italy, Japan, Israel and the UAR as a means of exploring and providing valuable data on radiation, temperatures, gravity and space phenomena. In 1957 the first artificial satellites appeared, circling the earth in increasing numbers and bringing about great advances in electronics and space navigation, for purposes of space research, communications, meteorology, navigation and geographic reconnaissance. 1959 was the year in which the vehicles which had been launched were able to become free of the pull of gravity, and 1961, with the orbital flights of Gagarin and Titov, and the ballistic flights of Sheppard and Grissom, saw man carry out the spectacular feat of travelling at high speeds in that region beyond airspace, away from the distorting action of the earth's atmosphere and deep into inter-planetary space. In 1962 some of the outstanding space feats included the extra-atmospheric flights of Glenn and Carpenter, and the orbiting of the satellite "Telstar," built under the auspices of the American Telephone and Telegraph Company, launched and tracked by the National Administration of Space Aeronautics of the United States (NASA) which will open the way for a world system of telecommunication by means of artificial satellites. This last year has been one presenting unsuspected perspectives, due to the efforts of an ever-growing number of technicians, engineers and researchers who work with the great tools at their disposal in order to extend the scope of human knowledge.

Astronautics and its progress are more than an adventure. They are great historical experiences in regard to space, the solar system and perhaps, in the future, to other galaxies. Each step, each discovery, each new

* Translated by J. Air L. & Com. staff.

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goal, changes with the passing of time and new horizons of knowledge are placed before the spirit of man. Until the present time it has been difficult to predict what will be the ultimate end of the race to conquer the cosmos. We do not know if it is an objective or if it is the beginning of a new era, nor do we comprehend fully the fundamental scientific reasons that have so dramatically opened before us such a remote and uncertain, absorbing and multiformed horizon. What seems highly in order at this time is to adjust technique and science, including social science, to this new reality. Particularly in regard to telecommunications and aviation, the economic, juridical and political problems which have arisen by virtue of advances in space technology demand careful consideration and immediate solution.

With respect to telecommunications the appearance of communication satellites has given rise to many important matters, among which are the imperative need for assigning radio frequencies to satellites, apportionment of the electromagnetic spectrum which is indispensable to space telecommunications, determining the frequency needs of satellites with a fixed position and with an equatorial orbit for determined services, as well as their relation to the systems used in direct radio transmission, establishment of the requirements of radio dissemination and curbing disturbances and atmospheric sound loss. Also, the conditions according to which telephonic, telegraphic, reproduction services, transmission of data, sound television, alert, radio transmission and space and telex order services are rendered at the time when the network of these communication satellites begin operations, complementing the international telecommunications network. The regions of optimum frequencies for space communications would seem to require the determination of such regions in conformity with international conventions on assignment of radio frequency bands to services, the determination of the band range necessary for lang-range communications and agreement on sharing earth-space frequencies with those used for other services. These questions have been on the agenda since 1958 through the International Telecommunications Union (ITU) and in particular, the International Consultive Committee (ICC), and in 1963, at the ITU conferences, the world network of communications using artificial satellites will be discussed.

Space telecommunication has been emerging from the exclusively governmental sphere into that of private enterprise, since telephone and telegraph business in certain countries have been concerned with telephonic and visual radio-space transmission by means of orbiting satellites. It is necessary to protect, on an international plane, the national patrimony of each country with regard to telecommunications so that no exclusive concessions may be granted for the exploitation of space in favor of certain nations or private organizations to the detriment of internal systems operating through the medium of space. A general participation should be planned for world use, demanding that the capacity of each nation be respected concerning future utilization of international lines of communication.

Many governments such as those of France, Italy, the United Kingdom, Argentina and Brazil, among others, through recent specific national organisms are considering these and other possibilities, such as sharing information given out by meteorological satellites now orbiting

the earth, in order to improve weather forecasting techniques. They act through the World Meteorological Organization (WMO), affiliated with the U.N., which stresses the research of physical forces affecting the weather and weather forecasts.

On the other hand, in the field of aviation, it is urgent that certain aspects of its relationship to space flight be studied, especially as the launching of objects and vehicles into outer space has as its first step, the passage of these vehicles through airspace. Such objects or vehicles may later re-enter airspace. Hence, taking into consideration the fact that they reach speeds in excess of 3,500 kilometers per hour thereby possibly causing sonic booms the patterns of air navigation on upper or lower space levels should be reconsidered, especially as to certain types of transatlantic and international flights, where airplanes may fly at altitudes of 15,000 meters. If a space vehicle or pieces thereof should cause any damage in airspace and on the surface of the earth, be it to an airplane, to property or to persons, juridical problems will arise which must be resolved immediately.

Thus from all of these space activities, products of the unbounded development of astronavigation, there emerges the result of the generous work of many men of science—an international organization of great import—the International Astronautical Federation (IAF). This organization was founded in Paris in 1950 at the instigation of the Society for Space Research of Germany in order to promote technical development, education, justice and peace in space. The concrete objectives of the International Astronautical Federation—which must not be confused with the Aeronautic Federation—are among others, to encourage astronautics for peaceful purposes; dissemination and propagation of techniques and other related information; to stimulate public interest and to give support to the development of all aspects of astronautics through various media of joint communication; to promote participation in astronautical research or in any other related projects by national or international organizations, universities, commercial enterprises or individual experts. In addition the IAF creates as its own activities committees, institutes, academies and work groups dedicated to the research and encouragement of astronautics; it participates in and cooperates with the United Nations and its specialized organisms, with appropriate national governmental agencies, with other international non-governmental agencies and with scientific societies and organizations and societies of higher education, in all phases of natural and social sciences related to the peaceful use of outer space.

The IAF is a non-profit association with educational and scientific objectives, organized according to the laws of Switzerland. It has temporary offices in Baden and is governed by a Council composed of representatives from each of its member societies, Board of Directors made up of a president, four vice-presidents, one general counsel and one secretary.

By a resolution of the VIIth General Assembly of the International Council of Scientific Unions, the Committee on Space Research was established in 1958 as a means for continuing international cooperation in space science after the end of the International Geophysical Year (IGY), which was initiated and sponsored by the ICSU. The IGY was an example of world cooperation of great import as to its organization, programs and results obtained through the establishment of centers of

information and through exchange of data on rockets and satellites with reference to the earth's magnetic field, its extent and intensity. Information concerning the depth, characteristics and strength of the radioactive regions in outer space, the phenomena relating to earth gravitation, the dimension and frequencies of the impact of micrometeorites and other scientific data of immeasurable value was also exchanged.

Associations from 40 nations take part in the International Astronautical Federation, working toward one of man's greatest ideals. To the nations we must now add Mexico, Rumania and Cyprus, which were elected in 1961. Mexico is represented by the Mexican Society of Interplanetary Studies, founded in 1955 and having as its president Dr. Manuel Sandoval Vallarta.

Mexico is a member of the Juridical Committee of the Special Commission on the Utilization of Outer Space for Peaceful Purposes of the U.N., and has also cooperated in space navigation matters through a Mexican-American Committee in which Mexico is represented by Jorge Suárez Diaz and Ricardo Monges López, both engineers. This Committee, formed for scientific, not military, purposes, has no relationship to programs of atomic energy. It has concerned itself with the joint Mexican-American establishment of a Tracking and Communication station in Guaymas, in accordance with the program of launching a man into space, provided by Project Mercury, uniting with stations in East Africa, Australia, Spain, U. S., Nigeria and the United Kingdom.

Mexico has undertaken technical experiments in the field of rockets, meteorology and communications through the praiseworthy efforts of Mr. Walter C. Buchanan, a distinguished teacher of two generations of Mexican engineers, with excellent practical results. Furthermore, other studies are being made under the auspices of the National Autonomous University of Mexico, the National Polytechnical Institute and other private organizations. Their modest efforts have already given indisputable results that will benefit communications and especially Mexican telephone, radio and television enterprises, national passenger transportation and other no less important public and private endeavors.

The International Astronautical Federation relies on three organisms which are fundamental in the interest of peace: the International Astronautical Academy; the International Institute of Space Law; and the Committee for the Science of Living.

The International Astronautical Academy was formally organized by the XIIth Congress of the IAF. The first meeting was held on August 16, 1960 under the new Academy regulations. The Academy, which is an organization of the highest scientific caliber, is composed of the most outstanding experts and sociologists in the world. It is concerned with the different aspects of space navigation as a basic auxiliary to engineering and other sciences such as astronomy, physics, chemistry, mathematics, aeronautics, meteorology, electronics, the law and even medicine and other fields such as physiology, which are concerned with the subject of survival in space. At this time there are approximately 76 members from some 18 countries. The powers and principal duties of the Academy are the following: to advise the President of the IAF when it is so required; to call scientific meetings and to plan scientific studies; to issue an international technical publication devoted to astronavigation; to

award medals and prizes with the object of promoting progress in this field; and to undertake other endeavors which are deemed necessary to promote progress in space travel.

The Academy has organized various Work Committees to take care of special projects. These include financing, scholarships and international lunar laboratories. The work groups of the Academy deal with: space-propulsion; astrodynamics; transformation of energy; trends in research of combustion resulting from space exploration; exploration of the solar system by means of radar; vehicles; structures; recent results and international astronautical plans. Round tables have been set up on radioastronomy, space communications and equipment, and there is also a special group working on systems of high quality combustion. The Academy puts forth considerable effort toward international cooperation.

The Mexican, Argentine and Brazilian Societies, following the example of Italy who in 1963 is expected to launch a small communications satellite at Perdasdefogu, in Sardinia, have presented a project for the joint use of an inter-American satellite for the purposes of scientific research. This research plan is to be carried out by the Institutes and Universities of Latin America.

At this time the Director of the Academy is discussing with UNESCO the feasibility of calling a Conference on the scientific and technical problems of "Man in Space."

The International Institute of Space Law was founded in 1959 as the culmination of a decade of work carried out by various preceding juridical organizations. Its offices are in Washington. Its great importance stems from the times in which we live. Now that anarchy, despotism and contempt for humanity are shaking international order, weakening established institutions and violating the rights of man, thwarting peace and justice, wasting the endeavors, efforts and aspirations to freedom such as those underlying this Institute, the dogma and disciplines to be followed by governments and the peoples of the world must be provided. This Institute is presided by Professor John Cobb Cooper, whose knowledge and experience in the juridical sector of astronautics are widely recognized. Due to the vision and energy of its illustrious President, the Institute devotes itself unreservedly to the fulfillment of its obligations regardless of nationalities and with an objectivity of thought and programing beyond international delimitations.

In fact, it was on January 5, 1951, at the Free Law School of Mexico that Professor Cobb Cooper delivered his historic lecture on "High Altitude Flights and National Sovereignty," which was highly praised in space law study circles. There were other publications on the subject, to be sure, but without detracting from the literary or juridical merits of such works, it was Professor Cooper's conference monograph, articles and other later publications which promoted research, methodization, and the sum total of ideas prevailing in this field of the law.

The International Institute of Space Law has sponsored various talks which have served to synthesize that which is universal and sometimes even cosmic. These talks on space law held at The Hague (1958), London (1959), Stockholm (1960), and Washington (1961), were useful in helping the Institute when dealing with the juridical problems within its province and in fulfilling its purposes, functions and aims.

Among the problems of space law and politics within the scope of this organization, we find, among others, those probiems relating to juridical principles applicable to outer space; the juridical regime which must govern space vehicles; state responsibility in space and other experiments relating to man's activities in outer space which may or may not raise juridical questions. Since the basic purpose of the Institute is to promote space flights and exploration for peaceful purposes among all nations it not only must cooperate with all scientific astronautical associations, but it must also facilitate the development of the political and legal systems which lead to such international cooperation.

The functions and objectives of the Institute are to advise the president of the IAF when so required; to undertake other works which may be deemed necessary in the promotion of the social aspects of astronautical science; to promote outer space flights and explorations; to publish records and data and a periodical review; to award prizes; to hold sessions and talks on the juridical and sociological aspects of social sciences and to prepare studies and information, and to adopt, add to, or amend the statutes applicable to internal matters of the Institute, without prejudice to the constitutional provisions of the IAF or to the resolutions relating to the Institute.

The International Institute of Space Law has the support of a Directive Council composed of twelve members, and of eleven work groups to which subjects of the greatest interest have been assigned. In view of the diversity of opinions regarding the regulation of space law matters on an international level, and of the lack of juridical definition of airspace or of the limitation of the altitudes in which the States may exercise jurisdiction, the work of the Institute is extremely arduous and complex.

The development of space techniques has proved that State territories comprise a three-dimensional domain, thus giving rise to three laws—terrestrial law, maritime law and space law. In this sense space law is the expression of the territorial limits of national sovereignty with reference to all States and the efficacy of the law within a part of its territory regarding one State only.

It should be noted that when we speak of space we do not do so in terms of Kant's theory, that is, regarding it as an a priori form or category of perception, which exists only in the mind of the individual or states. Nor do we speak of it in an exclusive form according to the calculations of the German mathematicians Moebius, Riemann and Gauss, who radically substituted the Euclydian and Kantian concepts of space for the so-called pure fourth dimensional space concept, since we do not agree with the description of space as only explainable by means of numerical formulae. We prefer to accept the traditional conception according to which space consists of bodies with real and objective existence, as a zone of the universe of undetermined form, expressed in terms of atmosphere with an ethereal covering.

Newtonian space is the basis of the law of universal gravity, a field in which masses attract each other, and perhaps a space such as conceived by the Argentine jurist Aldo Armando Cocca in his book "Toward Interplanetary Law." In that work Dr. Cocca would seem to say that space law should operate on Einstein's theory of relativity, according to which space is fourth-dimensional, curved, closed, finite but unlimited and

closely connected with the idea of space-time, as a unit or universe with four dimensions: three coordinate space dimensions and one temporal dimension.

It is a space which should not be identified with the idea of place or portion of the earth's surface governed by an autonomous juridical system, since that is identified with terrestrial law. It corresponds to the space where the event, the effects or extent of one or more events related to aviation, electronics, astronavigation and other technical or scientific phenomena take place, such events, by necessity, being situations governed by law.

Its principles are not metajuridical in the presence of the normative constructions of juridical science; therefore we will briefly express our opposition to the idea of metalaw as expounded by Andrew Haley, a distinguished North-American lawyer. The idea of space should be adjusted to legal norms, since it represents, substantially and on a phenomenological level, a material body and, within the juridical order, a common property. Furthermore, State sovereignty is conceptually unique although its exercise can be distinct whenever it refers to land, seas or space. However, this sovereignty is constitutionally one: its exercise in space can vary with respect to its exercise on land or on the seas. In space, however, it cannot have different forms nor can it be subject to material bases which are not completely verifiable.

One basis is that although cosmographically speaking space may be divided into atmospheric or terrestrial space, interplanetary or solar space, and intersidereal or astral space, with respect to the effects of man's activities in space, and for the juridical consideration of such space activities space is one, unique and indivisible. Therefore national sovereignty and space must be conceived as a unit.

National sovereignty cannot be limited, and it should be obvious that if this delimitation on the high seas has been the cause of constant conflict, (the determination of territorial sea today is still a matter of grave concern to maritime law) it is to be presumed that an agreement on space law will be difficult to reach, besides being unnecessary. In fact, the movements of the earth rotating on its axis and rovolving around the sun in relation to national territories and heights at which flights take place at the present time or at which electromagnetic waves are used, demonstrate that this is correct not only from its technical aspect but from the juridical point of view as well.

We also assert that the division of space is unnecessary for we have had international civil aviation for more than fifty years and use of the magnetic spectrum in telemechanics for over one hundred years without the need for dividing space into jurisdictional zones. We must use an enlightened approach to the establishment of the laws of operation, making possible the juridical regulation of aviation, electronics and outer space navigation in a manner similar to that used in the establishment of the freedom of the air and distribution of frequency radio and television bands.

If the eight freedoms of the air refer to the exercise of commercial laws in international civil aviation we cannot see why these freedoms cannot be added to the new space freedom regarding the permissibility of the activity of missiles, artificial satellites, space ships and space stations, not only as to the altitude and vertical position of such vehicles but also

as to trajectory, flight missions, instruments in use and functional characteristics of the vehicle or object. We could also identify such vehicles by means of an agreement regarding the assigning of individual designations to each apparatus. These indications could be agreed upon at regular pre-determined intervals at least until identification could be established by means other than, for example, orbital characteristics or trajectory of the vehicles. International agreements could set forth a system controlling the launching of space vehicles, their respective calling codes, visual markings, elements, orbiting currents and trajectory.

More especially, because of the close ties existent among all the techniques that have been developed concerning space, techniques which are actually interdependent, one cannot conceive of a space law independent of air, aeronautics, aviation, radio-electric, interplanetary law. To the contrary, one must think of a law tending to completeness, a law which contemplates the possibility of establishing a system embracing phenomena of an indisputable organic novelty, even to the point of man's leaving the earth and establishing himself on another planet, breaking the juridical nexus linking him to earth.

At the present time and in all nations of the world the unbounded development of astronautics brings forth new demands for human freedom and respect for the norms of rights of peoples, which constitute the dominant traits of the world in which we live. Without them the justification of international life must be considered frustrated.

The Committee on the Sciences of Life of the IAF which considers imperative the protection of human life on earth is presided by Mr. Carl Johan Clemedson and is concerned with various matters related to space medicine. Two sessions have been held on bioastronautics, the first one presided by Dr. W. Randolph Lovelace II and the second by Mr. R. Grandpierre. Among others, the following subjects were studied: lunar influence and lack of gravitational pull in relation to the germination and growth of plants; probable existence of reasoning human beings in other planets; psychophysiological reactions of weightlessness observed during recent bioballistic and biosatellite experiments and effects on the cerebral centers of equilibrium and orientation in the uniform magnetic field. Furthermore, wide studies have been carried out on the analysis and missions of multi-crews in space; security systems on manned space flight missions; results on the physiological reaction under space flight conditions and other similar missions of great importance to space medicine.

With the firm purpose of contributing to the maintenance of peace, the IAF has cooperated outstandingly in the increase of joint projects relating to the simultaneous launching of probe rockets, in the utilization of launching pads, equipment and instruments for satellites, exploration of outer space, tracking and telemeasurement, elaboration, interpretation and exchange and weighing of information on space activities.

The contribution of the IAF is doubtless very important in the organization of space science through the encouragement of scientific astronautical activities, and the development of the capacity of each nation as well as the application of the results of space science and the development of its activities in an open and orderly manner.

This scientific research should be applied exclusively to the benefit of humanity. It must tend to improve weather forecasts, to perfecting radio

communications, to the launching of geodetic, mapping and auxiliary satellites, and to the realization of manned sidereal flights for peaceful purposes.

Probe rockets, earth satellites, instruments for the exploration of space and the network of observation stations as instruments of man's scientific activities must be utilized for research toward the improvement of equipment and space vehicles, as other auxiliaries to determine more satisfactory trajectories or to make more precise the recognition of orbits, effecting physical terrestrial observations and research, not only theoretically but also through mathematical methods.

This vast amount of space activities which trace the very real and dramatic limits of war or peace, should be assigned by the governments and their official organizations such as the United Nations to the Peaceful Use of Outer Space, by means of international agreements concerning the use of radio frequencies, registration of orbital components, continuous radio-transmission, the elimination of exhausted satellites, return to the atmosphere and recovery of space vehicles, return of equipment and space contamination.

Those nations that launch objects into space, be it in predetermined orbits or beyond, should pass on such information to the UN Commission so that this Commission may be apprised of such launchings.

These international agreements will lead to order, security and progress, which are the contents, but not the correlatives, of universal justice.

Lastly, to freedom and peace, which are the most prized possessions of mankind.

SPACE EXPLORATIONS AND SPACE LAW*

By Dr. Victor José Delascio†

SINCE that historic date of October 4, 1957 when Russia launched the first Sputnik into orbit, soon followed by the United States launching other satellites, a new world was opened to man which will change completely ideas, science, medicine, communications and life itself. The Sputniks were followed by the Luniks, Vanguards, Tiros, Explorer, Transit, Echos, Courier, Discoverers, Cosmos, etc., and tomorrow there will be Samos, Nimbus, Centaur and hundreds of others.

Many sociologists and historians maintain that space probes may replace those forces that historically have driven nations into armed conflict. Their theory is based upon the hope that the conquest of space can, perhaps, be the moral equivalent of war, substituting certain material and psychological needs. Further, it is hoped that the absorption of energy, resources, imagination and the strong impetus of putting into effect these space adventures may be an effective medium for maintaining the peace.

Mankind will never forget another no less memorable date, April 12, 1962, when the first manned spaceship Vostok was launched in the Soviet Union. Major Yuri Alexseevich Gagarin made the first non-controlled orbital flight around the world in eighty-nine minutes, at a speed of

* Translated by J. Air L. & Com. staff.

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28,900 kilometers per hour. This successful feat opened new horizons to the probe and exploration of outer space. Engineers already have provided man with the necessary space vehicle. Medical researchers are studying many factors related to life in space—in order to make possible the flight of man into those immeasurable regions. To place man safely in an entirely new environment requires much more extensive and profound knowledge of human biology than we now possess. In the field of technical medicine, good results have been obtained from space flight exploration programs. With regard to man's quest for knowledge, it can be said that no enterprise has excited human imagination more than our eagerness to probe into space. New worlds to conquer, new distances to travel, new problems to solve, new information to be gathered in all branches of human knowledge will take us inevitably into the search for better, deeper and more universal education. Already space explorations have been useful in extending science and technology into numerous specializations.

In this study we shall confine ourselves solely to analyzing a few fields in which space exploration is bringing about good results. In the field of meteorology, NASA (National Aeronautics and Space Administration) has announced a program which calls for the launching of 300 satellites during the next ten years; in the field of communications, American Telephone and Telegraph Company is studying a coordinated system of fifty relay stations which will change the communications media completely; the United States defense and alert system may be based upon this system. On August 12, 1960, the United States put into orbit the Echo satellite and in October of that same year launched the "active" communications vehicle "Courier," equipped with transmitters, receptors and an electronic belt which enabled the reception and transmission of messages in accordance with instructions sent from earth. These satellites are being used to initiate a new system of communications in outer space. One of the principal characteristics of this new system will be the automatic translation of one language into another.

Returning to meteorology, we recall that in April of 1960 a new era was opened in the history of atmospheric exploration by man. At that time Tiros I, the first meteorological satellite, was launched by the United States; it was followed by Tiros II which was orbited on November 23, 1960 and Tiros III on July 12, 1961. These satellites take television pictures of atmospheric coverings and clouds and make meteorological observations while circling the earth. They also assist in the search for tornadoes and hurricanes. In the near future this class of satellite will enable simultaneous observation of all regions. The United States plans to launch another satellite, the "Numbu," in 1962, with an almost polar orbit. It will permit observation of the entire surface of the earth at a height of 1,100 kilometers, and will carry various instruments to measure solar and terrestrial radiation. This class of exploration will be of great assistance, especially to aviation, maritime navigation and commerce.

Just as the great voyages of discovery in the XV and XVI centuries brought about the conquest of new territories, probing voyages in space will lead man to the conquest of mysterious and unlimited regions and will advance science, the arts, education and human knowledge.

The basic sciences of engineering contribute to these voyages by fur-

nishing the vehicles and equipment necessary to the exploration of outer space. Medicine, psychiatry and biology are increasing their contributions by attaining solutions to the problem of adapting man to space conditions. But the science of social engineering through law, as denominated by Professor Goodhart, has been very slow to furnish adequate rules of human behavior in space. A longer delay or possible failure could lead to chaos. As maintained by Professor Goodhart, law is the structure without which society will crumble.

In our opinion, an effective and logical structure would require a new international agreement, preferably on a world basis. Time is of the essence, for space conquests will not await the will of the legislator. In September of 1960 President Eisenhower, before the General Assembly of the United Nations, concerned with the lack of international agreement, warned the world with these words:

> Another problem confronting us involves outer space. The emergence of this new world poses a vital question: Will outer space be preserved for peaceful use and developed for the benefit of all mankind? Or will it become another focus for the arms race, and thus an area of dangerous and sterile competition? The choice is urgent.

It is common knowledge that the many satellites already launched are still circling the Earth without any juridical regulation. It appears that the states have tacitly permitted the launching of satellites with the presumption of international cooperation. Certain principles of international law, universally recognized, could solve some of the problems. But, there are many other problems which are outside all conventions and beyond the scope of all existing legal norms. There must be a new law formed which will govern this new field: the law of astronavigation and of satellites. It is generally recognized that air space is already under juridical control and is principally regulated by the Chicago Convention. Naturally, social juridical structure presently applicable to "air space" adjacent to the Earth cannot be adapted to outer space.

Before going into the law of satellites, we should determine precisely what is to be understood as a satellite. James Van Allen has said that from the scientific point of view the satellite is the product of natural evolution of rockets, which are products of natural evolution of airplanes and balloons, which in their turn, are the natural product of man, climbing trees and mountains to arrive at the top and therefore acquire a better view. From the juridical point of view the satellite is not an airplane. We believe that a satellite is defined by its characteristics, its orbital movement and therefore its gravitational navigation and its artificiality. On this premise any spaceship circling the Earth, even transitorially and obeying the laws of gravity should be considering a satellite.

No less important and urgent is the need to define the limits of space. Some writers have suggested that space could be divided into three zones subject to a distinct jurisdiction. The problem is not as simple as it appears, because, according to General Thomas D. White, atmosphere and space are blended into an "indivisible whole." The easiest problem to solve is that of defining the frontier between the second and third zones, that is, between the zone under international control and that of free navigation. The law of satellites logically would only govern as far as

the limits of terrestrial attraction which, according to Professor John C. Cooper, extends to some 251,000 kilometers in height and could well be set at 250,000 by convention. The line of demarcation between the first and second zones, that is, where airspace ends, is full of difficulties because all the old theories regarding the reach of arms, aerial espionage, etc., have been replaced by technological advancement. Professor Von Karman has probably made the most scientific attempt to trace the dividing line by placing it at a height of more or less 72,500 meters. Others set it at sixty-four kilometers, still others at eighty kilometers and 100 kilometers. Actually the technical frontier of the atmosphere appears to be around 100 to 400 kilometers, but at this time we know of no abrupt transition from one zone to the other. The juridical frontier will be only conventional, in the entire sense of the word, and its coincidence with the technical frontier cannot have more than an approximate value.

According to Andrew Haley the foundation of the laws relating to the reporting of the launchings of satellites emerged as a consequence of the series of agreements and exchanges arising out of the International Geophysical Year ended on December 31, 1958. It can be accepted that international cooperation has resulted in a reciprocal and tacit authorization to effect space research.

If outer space is under the same conditions as the high seas, the rest of the structure which will supply the law must be determined by international agreement, if the world is to live in peace. An international convention could set up the necessary norms and regulations or the nations of the world, through agreement, could grant to an international organism the power to set up norms which could be applied as law immediately. It may be desirable to request that all the nations of the world convene to regulate and organize outer space. President Franklin D. Roosevelt in the case of airspace called an international conference which resulted in the Chicago Convention and the International Civil Aviation Organization. This illustrious personage in an address to the delegates from fifty-two sovereign states convened in Chicago on November 1, 1944, said:

> The rebuilding of peace means reopening the lines of communication and peaceful relationship. Air transport will be the first available means by which we can start to heal the wounds of war, and put the world once more on a peace-time basis.

He added that the fight for the freedom of the seas had been the direct result of various wars, not only in the Eastern but also in the Western Hemisphere:

> We do not need to make that mistake again. I hope you will not dally with the thought of creating great blocs of closed air, thereby tracing in the sky the conditions of future wars. I know you will see to it that the air which God gave to everyone shall not become the means of domination over anyone.

Now we lack an organism which will consider all the juridical aspects of satellites and outer space exploration.

No less praiseworthy is the unobtrusive but productive and excellent work of a few private juridical and scientific institutions which are studying space law. Among them we should mention the purely juridical groups such as the International Law Association, the Association of American

Jurists, the Society of International Law, the American Rocket Society, the International Academy of Astronautics and the International Institute of Space Law.

The United Nations, on December 12, 1958 approved a resolution recognizing "the common interest of mankind in outer space and the common objective is to use it solely for peaceful ends." The same resolution created a space committee composed of certain member states to study various juridical problems. At the end of 1959, the United Nations convened to establish a permanent committee for the peaceful use of outer space. After the suborbital flight by Allan Shepard last year and the orbital flight of Lt. Col. John Glenn on February 20 of this year, the possibility of international cooperation in outer space was perceived. Both the Soviet Union and the United States reiterated their intent to cooperate in the exploration and probe of interplanetary space. On March 20 of this year the United Nations Committee for the Peaceful Use of Outer Space, composed of twenty-eight nations, convened for the first time and there was some hope of reaching agreements on cooperation in space.

There are many phases in the juridical regulation of satellites which need immediate legislation. For example, the fields of registration by nations, liability for damages occurring in foreign territory, regulation of boardings, the law of compensation, etc. require prompt action. There are many problems in this area. It would be desirable that all states cooperate and arrive at an international agreement such as the Antarctic Agreement signed in Washington in December of 1959. This resulted in an agreement with the Soviet Union on the exclusion of sovereignty, control and exchange of data. Such a convention should contain the declaration that in outer space there be no law of conquest nor occupation, but that it be open to everyone and used to encourage peace, scientific advancement and the welfare of mankind.

I believe that the initiative for calling such a world meeting for the juridical regulation of outer space will come from the New World, because America and her men are peace-loving. However, this Continent should contribute to the early salvation of spiritual conquests for it knows well that all might be lost with the conquest of space.

LIABILITY OF THE GRATUITOUS AIR CARRIER UNDER FRENCH LAW*

By Andre Garnault†

BETWEEN inaccuracies and omissions of the law and the imaginative endeavors of legal writing, court decisions have not concluded the search for norms governing gratuitous air carriage and the liabilities resulting therefrom.

In the beginning it was the lack of legislation that affected the problem. The law of May 31, 1924, whose eminent proponents were concerned about imposing the classical liability norms upon the ascertainment of the technical obligations peculiar to aviation, brought about satisfactory results through its exceptionally beneficial protections of the profit of the common carrier. This law provided for a system of conventional exculpation which provided a defense in cases of pilot error and of "air risk," but it failed to deal with the problem of the gratuitous carrier. Ascertaining the existence of this gap and exploiting the subject according to which the gratuitous carriage would be outside the convention, court decisions could not admit that the provisions authorizing exculpation (such as provided for in the text, Articles 42 and 48) would be beneficial to the gratuitous carrier. As a consequence a surprising result was found to have been established: the strict classical liability norms were found to be applicable to gratuitous air carriage.

There is no doubt that for moral reasons Article 1384 of the Civil Code and its implied presumptions will be discarded according to the interpretation by courts which finally became unanimous, but Article 1382 of the Civil Code, upon the demonstration of an error which is the primary cause of an accident imputable to the gratuitous carrier, will bring unlimited remedial sanction upon the guilty party.

One more unusual exception deeply affects this rule: the carriage may be gratuitous but interested—when an interest of the carrier is shown. Such a carrier is classed as "interested" according to the language of the judgments, and in such a case, at the price of particularly ambiguous terminology, the gratuitous but interested carrier is subject to Article 1384 of the Civil Code and to its presumptions of liability which cannot be easily overcome.[1]

One must acknowledge that because of these more or less artificial distinctions, and the lack of precision in applying the retained interest test, equity was particularly abused. The carrier for hire, rewarded and at fault, was favored even to the point of exculpation. The gratuitous carrier was subject to damages, arising from a proven negligence, which imposed total reparation. The non-remunerated but interested carrier was charged with heavy presumptions characteristic of the liability of the act of things. Disorder flourished, in fact, in the realm of gratuitous carriage.

Furthermore, in pointing out the unfavorable fate of the gratuitous carrier, we should remember that international law offered no safeguards against the injustices of municipal law. According to Article 1, paragraph

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[1] See Cassation, May 13, 1947, Revue Générale de l'Air 469 [1947].

1 of the Warsaw Convention, the gratuitous carrier doubtless benefited from the limiting protection of the liability provided in this text but only in the case where the carrier was a common carrier. Amateurs and sportsmen and clubs were sacrificed.

In short, it was necessary to put things in order. This came about, though too late. Its effectiveness was taken for granted.

The law promulgated on March 2, 1957, had two objectives. The first brought about an alignment of municipal law with the Warsaw Convention concerning the common carrier. All common carriers, whether local or international, were subject to the Convention. Deprived hereafter of the exculpatory benefits provided by the law of 1924, they were not protected by the limitation on damages charged against them.

The next text also envisaged filling the gap in the law of 1924 concerning all gratuitous carriers. Let us first note that as a result of a prolonged "shuttle" between the two Assemblies, the Senate was obliged to undertake a revision of their initial text which demonstrated generosity in favor of the gratuitous carrier. Contrary to the text originally adopted, no exculpation would be stipulated to his benefit in the case of a navigational error, but he could at least claim the benefit of limitations provided by the International Convention and the victim would have to prove his fault in order to obtain redress.

One could therefore take for granted that the controversy would be checked but this would be to underrate carelessly the imagination of certain theorists. Under their instigation a brilliant and destructive assault would be conducted against the effectiveness of the law. The first step would be to deny any effect to this law, except to the extent it would apply to the common carrier, the only party to which the law is linked by the international text. Thus, by referring to the Warsaw Convention, the law of 1957 carried within itself the seed of its ineffectiveness. There was an easy answer to this narrow interpretation of a law which the Assemblies hoped would have general application. The norms of municipal law concerning gratuitous carriage refer to limitations but do not in any manner call upon the restrictive applications of the International Convention provided for in Article I. In other words, the provisions of the 1957 text will apply to all gratuitous carriers without distinction. If it were otherwise, apart from the fact that the will of the makers of the law would have been betrayed, the text they established would become absurd, even as far as frustrating its advantages to those whom it precisely wanted to protect.

To this first attempt one should add an odd academic fantasy exploiting the disorder in the codification. It is recognized that according to the legislative terms of Article 113 of the decree of November 30, 1955, codifying the legislative text relative to Civil and Commercial Aviation, the definition of air carriage appears to exclude round-trip flights. Thus conceived, this article in effect reads: "Air carriage consists of transporting passengers, mail and goods from one point to another point." Therefore if this restrictive definition is accepted by the Courts, it would exclude from the benefits of the law of 1957 all air flights returning the passenger to the airport of his departure. All the pleasure flights of the aero clubs would thus fall outside the application of the law. To this fantasy of an analyst, one must simply rely that the text of Article 113

has absolutely no connection with the régime of air carriage liability. One must immediately stress the geometric absurdity of the argument. This argument could not be sustained unless an absolute coincidence were established between the point of departure and the point of arrival. It is recognized that it is a question of academic hypothesis. Furthermore, the argument in question is nullified by the provisions of Article 121 of the Code. This article stresses that non-stop flights returning passengers to the airfield of departure are classed among the carriages. In fact, inserted into the text of the codification at the beginning of Title III, Article 113 is nothing but a repetition of the first article of the decree of September 23, 1953, which is completely extraneous to the problem of liability. That article relates to organizing the system of coordination of air carriage and thus defining those carriages that are subject to its rules. It is therefore upon the results of a doubtful academic endeavor that such an effort has been made to influence the real scope of the law of 1957.

The major controversy, however, arises from an apparently more serious argument. It is noted that the law makes reference only to gratuitous carriage. What is going to happen in the case where carriage, while unrewarded is not gratuitous but is interested?

It is said that this ambiguous qualification, which is difficult to visualize, would permit the avoidance of the essential norms of the law in all cases where, although uncompensated, the air carriage in question revealed an interest of the carrier. Only the purely gratuitous act would benefit from the protection of the text. So the private pilot who, flying over mountains, takes on board to accompany him on this pleasure cruise a member of a local club particularly familiar with the dangerous aspect of the rough country over which they would be flying, would certainly be undertaking an interested carriage. This carriage, although uncompensated, would then be justiciable under the rules of Article 1384 of the Civil Code, and subject to the rule of the implied presumptions of liability. The same would apply in a flying competition or air rally requiring that the pilots carry a passenger in order to comply with the regulations of the trial in which they take part.

One can thus see how the erosion of the law takes place, becoming prejudicial precisely to those whose interests it would be desirable to preserve and whose activities should be promoted in the public interest. If the restrictive value of the law and the exclusion of the carriage interested in its enforcement are to be retained, the aero clubs and private pilots will be deprived of the advantages of a text the legislative history of which reveals that its objective is especially to protect them. In this manner casuistry would overcome the will of the legislator, and the operation of an uncertain idea of the court would destroy in great part the scope of the text. An effort by the legal writers has been made in this direction but up to the present time the courts have refused to come out in favor of it.[2]

It is our opinion that regarding these court decisions we must keep to the letter of the text. In ruling on the fate of carriage for consideration, by referring to the Warsaw Convention the law defines the position of

[2] See Tribunal de Grande Instance de Gap, decision of February 9, 1961. 1961 Revue Française de Droit Aerien 293; Court of Appeals of Grenoble, October 18, 1961, 1961 Revue Française de Droit Aerien 373.

the gratuitous carrier, neglected by previous law. How is it possible to conceive then that the legislator who was concerned over the continuation of a "shuttle" between the Assembly and the Senate, resulting from the problem of the gratuitous carrier would, through an incomprehensible omission which neglected to make any reference to the judicial notion of interested carriage, intended to deny all protection to that special category of carriage. In fact, in dealing with the gratuitous carrier without qualification or limitation the law necessarily excluded the judicial subdivision or distinction between "gratuitous" carriage without any interest and carriage which is gratuitous, but nonetheless "interested."

Furthermore, in order to halt inventions by the court or by the legal writer in this field, the law returned to the ruling of Article 24 of the Warsaw Convention which excluded all distortion affecting the principles it imposes once it defined the norms pertaining to gratuitous carriage: "The liability of the air carrier may not be sought except under the conditions and within the limitations provided for *hereabove*, regardless of the persons concerned and whatever the grounds upon which they intend to bring suit." The situation is therefore clear to a faithful interpreter. In air law the idea of special treatment of an "interested" carriage has not survived the promulgation of the law of March 2, 1957.

The law of March 2, 1957 has as its source a counter-bill of the Senate prepared by a professor of law opposing a text of governmental origin. In the 18th issue of the Recueil Dalloz of 1955 one may find as an appendix to an article by Dean Chauveau concerning the proposed bill and the substitute text suggested by him which was again taken up by the High Assembly. Nobody has disputed this eminent professor's authorship of this bill—only its scope and the wording. On this point Dean Ripert who inspired the law of May 31, 1924, has rendered justice to the sponsor of the law of March 2, 1957 in "Liability in Air Carriage," a comment in the Recueil Dalloz, May 11, 1957. Dean Chauveau has strongly opposed the attack developed by the supporters of the "interested" carriage against the general scope of the law of March 2, 1957. In an article on the subject of gratuitous air carriage, he denounced the fictitiousness of the distinction between a disinterested gratuitous carriage and an "interested" gratuitous carriage, and affirmed that the law has as its objective all gratuitous carriages which includes both types of carriage.[3] This analysis by the author of the text must not be overlooked. . . .

Finally, with common sense and even with equity, let us note that the hostile position taken regarding this interpretation seems particularly improper. How, for the survival of an artificial concept that is not based upon the law, can one justify that the professional carrier looking to profit, should obtain better treatment as to his liability than the private pilot or the pilot of an aeroclub, carrying a friend in order to meet the requirements of a sporting competition, or carrying a club member whose knowledge of routes makes a pleasure trip more agreeable or more safe.

Here the text, its inspiration and morality help to justify court decisions that have refused to acknowledge the idea of a separate category of "interested" carriage in the matter of air carriage. Against the law, an invention by the courts, even though ingenious, cannot prevail.

[3] Chauveau, *The Unrewarded Air Carriage*, April 27, 1960, Juris Classeur périodique 1556 [1960].

THE CONFLICTS AND STATE OBLIGATIONS UNDER THE WARSAW CONVENTION, THE HAGUE PROTOCOL AND THE GUADALAJARA CONVENTION

By Julian G. Gazdik†

THE Diplomatic Conference in Guadalajara, Mexico, in the Fall of 1961 finalized the "Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier,"[1] which was signed on September 18, 1961.

The preamble of the Convention states its object. The states signatory to the Convention, noting that the Warsaw Convention[2] does not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage, found it desirable to formulate rules to apply in such circumstances.

When ratified, the new Convention will operate in conjunction with the Warsaw Convention and with the Hague Protocol[3] amending this Convention and will have bearing on many aircraft charters and interchanges.

The Conference in Guadalajara in 1961 was not unmindful of certain conflicts that might arise after the new Convention comes into force.[4] Some of the apparent conflicts were eliminated in the course of the sessions. The suggestion[5] to insert a general provision in the new Convention to the effect that in case of conflict between the Warsaw Convention and the new Convention, the provisions of the Warsaw Convention should prevail was, however, not accepted by the Conference. Nor was an alternative suggestion adopted that the Guadalajara Convention should have precedence over the Warsaw Convention in the event of conflict. Both of these principles are recognised in international law but while the Conference realized the possibility of conflicts, in the absence of a generally acceptable solution the matter was left for the Courts to tackle when the occasion arises.

I. The Hague Protocol Conflict

A cursory examination of the problem indicates that conflicting treaty obligations if any, are not limited to the Guadalajara Convention but could be also considered under the Hague Protocol to amend the Warsaw Convention. As it is expected that in the near future the Hague Protocol will become effective, certain states will have both the Protocol-amended Warsaw Convention, and the unamended Convention in their legal systems. It is expected that other states, at least for the time being, will only have the

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[1] ICAO Doc. 8181.

[2] Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw, October 12, 1929.

[3] Protocol to amend the Convention for the unification of certain rules relating to international carriage by air, signed at the Hague, September 28, 1955.

[4] ICAO Guadalajara Doc. 12.

[5] *Id.* at 49.

original Warsaw Convention. One cannot help wondering what will be the position of the passenger in this dual system. What law will be the proper law determining the liability of the carrier? Will the question of jurisdiction be affected? Will there be any conflict of Treaty obligations of the states involved, and will the claimant or the defendant be able to take advantage of such conflicts, if any? What part will the private international law rules of the state play in the jurisdiction where the action is taken?

It may be presumptuous to attempt to answer these questions, but it will be convenient to examine some of the problems by envisaging hypothetical cases.

HYPOTHETICAL CASE NO. 1. A passenger enters into a contract with an airline registered in state A, to be carried to state C; partly by an airline registered in state A, partly by an airline registered in state B and partly by another airline registered in state C. State A and state B have both ratified the Hague Protocol but state C did not.

In principle, the unamended Warsaw Convention may apply to the carriage because Article 18 of the Protocol clearly determines its applications and provides that the Convention "as amended by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two parties to this Protocol or within the territory of a single party to this Protocol with an agreed stopping place within the territory of another State."

The nationality of the passenger or the nationality of the carrier may not matter. Nor may the fact that the action is taken in state A, state B or state C have bearing on the case, provided that the Court has jurisdiction. Article 18 of the Protocol, with its geographical test, appears to avoid the conflict itself although certain states have found it necessary to include in the enabling legislation to the Warsaw and to the Protocol express language to the effect that the provisions of the Convention are to apply irrespective of the nationality of the aircraft performing that carriage.[6]

The only conflicting treaty obligation that can be envisaged might be the one between state A and state B but it is surmised that state B having ratified the Hague Protocol may be estoped by its terms from claiming its application. The fact that there will be a duality of international legal systems applicable to air carriage does not necessarily cause conflict.

This is true, however, only if the unamended Convention remains in existence side by side with the Protocol. If state A or state B denounce the Warsaw Convention, under the terms of Article 24(3), the situation might completely change. Carriage from state A to state C, not being Protocol carriage, might not be under any international regime.

While this may not be intended by certain proposed legislations implementing the Hague Protocol, there is reason to believe that this could be the result, unless the validity of the Warsaw Convention, within its geographical scope, is carefully protected.

HYPOTHETICAL CASE No. 2. The circumstances are the same as before but state A and state C both ratified the Protocol and state B did not. Under the terms of the Protocol, the passenger having the nationality

[6] Forrest, *Carriage by Air: The Hague Protocol,* 10 Int'l & Comp. L.Q. 726 (1961).

of states A, B or C should in principle, all come under the regime of the Protocol-amended Convention, whatever their nationality or the nationality of the carrier performing the carriage under the contract. Naturally this principle will apply only in state A and state C which have ratified the Protocol. In these same jurisdictions it is not inconceivable however, that a claimant having the nationality of state B might raise the question of conflict of treaty obligations between state B and state A or C with which the relations of state B are governed under the Warsaw Convention. Conversely the carrier registered in State B might do the same in order that he might avail himself of the lower Warsaw limits.

The first observation is that Article 18 of the Protocol, useful as it is to determine the application of the Protocol under the applicable laws of the forum, may not necssarily help to overcome the difficulty of conflicting treaty obligations.

The second observation is that while the conflict of law rules in force in the jurisdictions (state A and C) may have bearing on the legal position of the claimant or defendant, they will not help much to resolve this question of conflicting treaty obligations.

In this hypothetical case, both states A and C are parties with state B to a treaty that conflicts with the treaty in existence between themselves, and the only question to determine is whether, under the rules of international law, state B could or could not insist upon full compliance with the pre-existing treaty obligations with either state A or C.[7] It is easy to answer this question in principle, in the affirmative. There may be, however, considerations that may mitigate against this strict position.

No state would knowingly give effect to a Treaty, multilateral or bilateral, that might be in conflict with a previously existing treary obligation, but possibility of such conflict can arise. In order to avoid the conflict the state may resort to the maxim, lex posterior derogat priori.[8] It may be reasonable to apply this maxim, although it is not an accepted international law principle, to conflicting treaty obligations under the Warsaw Convention and the Protocol.

In this connection one should first bear in mind that the Warsaw Convention and the Hague Protocol are multilateral treaties. In accordance with its provisions, any state can ratify a multilateral Convention and it need not obtain consent to that effect nor acceptance from the other states who are signatories to the Convention or who might be entitled to adhere to it. The unilateral act of ratification of the individual state automatically brings the Treaty into operation with respect to the ratifying state, provided of course, that the required number of ratifications for effectiveness of the Treaty has been already achieved. Subsequently and as the result of ratifications by other states or the lack of such ratifications, the same state might find itself in conflict with its earlier treaty obligations with other states, who have signed the new Convention and are also under the regime of the old Convention but decide not to ratify the new Convention. It is submitted that this situation may provide an excuse for the state alleged to have violated its previous treaty obligation—at least as regards other states who also signed the later treaty.

[7] Schwarzenberger, I *International Law* 475 (3d ed. 1957).
[8] *Id.* at 472.

One should also consider that these Conventions deal with civil rights—property rights of individuals and not rights and obligations of states towards each other. These Conventions are not political treaties but rather they are non-political or commercial treaties.[9] The difference may not be of great importance but it is sufficient to distinguish in the delicate field of state obligations and the manner in which such obligations might be enforceable. The state ratifying an international convention dealing with private rights undertakes certain obligations but the nature of these obligations is not necessarily the same as that of obligations of the states arising out of political treaties requiring an act or conduct on the part of the state.

In the former it might seem that a state has fulfilled its obligation under the international treaty once it has ratified the treaty or enacted the required legislation to make it effective in its territory. It might be difficult to believe that a state could then be effectively accused of having violated its obligations under the treaty merely because, subsequently, conflicts arise under a new multilateral treaty. And the conflict may be due only to an adherence or ratification by another state.

The most important practical consideration is, however, the fact that treaties are governed only partly by the principles of international law. To a large extent they are determined by municipal law. International law governs the relations of the states, inter se, and under English law determines the validity, the interpretation and the enforcement of treaties as between the parties. Municipal law, on the other hand, determines the effects of treaties upon persons within the allegiance of the states who are parties to such treaties.[10]

Some treaties may require that the domestic law of the state should be changed. In that event the Treaty is not performed until the appropriate legislation is enacted. At least in Canada the Treaty itself is not equivalent to an Imperial Act and without the sanction of Parliament, the Crown cannot alter existing law by entering into contract with a foreign power.[11]

In this respect the Canadian law seems to be somewhat different from United States law, where by an express provision in the Constitution, treaties duly made are the supreme law of the land "equally with Acts of Congress duly passed" and as such they are cognizable before both Federal and State Courts.[12]

Not every Treaty requires legislation in Canada. However, treaties do require legislation when they affect private rights or when they involve a change in the law of the land or when they involve action which is not in the ordinary scope of the discretionary power of the Executive.[13]

The Warsaw Convention, the Hague Protocol and the Guadalajara Convention are all subject matters that require special legislation in Canada and the right of the claimants and the defendants will be determined under the terms of the Statutes implementing such treaties.

There is no uniformity among states as to the form in which inter-

[9] Matas, *Treaty Making in Canada*, 1947 Can. B. Rev. 460.
[10] 6 Halsbury 519 (2d ed. 1948).
[11] Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Company Limited, [1932] S.C.R. 495, [1932] 2 D.L.R. 250.
[12] 63 C.J. *Treaties* § 3 (1933).
[13] Matas, *supra* note 9, at 458.

national treaties are to be made effective. In some states ratification is all that is required to make a treaty the law of the land; in others, as in Canada, enabling legislation is required before the treaty becomes operative. In either case it might seem that states have completed their obligations once they have made the international treaty effective in their respective jurisdictions.

It is submitted that the scope of the Courts in the various jurisdictions will be limited by the ratification or enabling legislation.[14] When there is conflict between the treaty and the Statute putting it into force, the provisions of the Statute will prevail. In these circumstances it is doubtful that the claimant or defendant could effectively raise before the courts the conflict in treaty obligations or the resulting breach of duty under the Warsaw Convention or the Hague Protocol. This does not mean that the conflicts between treaty obligations are absolutely without remedy. It is possible though not probable that a state may be persuaded by the interested party to insist on strict compliance with the terms of the treaty. In that event the state may, of course, avail itself of the required means of settling disputes in international law.

It is conceivable that the solution to conflicts between the Warsaw Convention and the Hague Protocol is sought by exercising the right to renounce the Warsaw Convention (Art. 24(3) of the Protocol). It is easy to show how unsatisfactory a solution this might be. It would attack the large measure of valuable uniformity that already exists in this field of private air law. Instead of avoiding conflicts it would create new ones.[15] Surely the avoidance of some possible technical breaches of treaty obligations will not warrant such a drastic step.

Hypothetical Case No. 3. If the action is taken in state B, whether the court will apply the Protocol to the carriage between state A and state C in the above circumstances will depend on the applicable private international law rules. Conflicting treaty obligations do not arise because state B is under Warsaw Convention obligations with respect to both states A and C.

In conclusion, theoretical as it may be, it is not inconceivable that a state which has ratified the Warsaw Convention but has not ratified the Protocol may exercise its rights under the existing Warsaw Convention and object to the application of the Protocol to its national in a jurisdiction which has ratified both the Warsaw Convention and the Protocol. Such intervention presumably might only take place after all recourse before the courts of the respective jurisdictions is exhausted and then again, only if the person is able to convince its state to intervene on his behalf. The effectiveness of such intervention, in the circumstances, may well be lessened by the fact that his own state has been one of the signatories of the Hague Protocol, if that is the case.

II. The Guadalajara Conflict

Having considered the co-existence of the Protocol and the Warsaw Convention, we may now turn to the situation when, in addition to these two, the Guadalajara Convention will also be in effect and may come into play. It is easy to envisage the problem. The air carriage may involve

[14] Nettl, *The Treaty Enforcement Power in Federal Constitutions*, 1950 Can. B. Rev. 1051.

[15] Makiewicz, *Conflicts between the Warsaw Convention and the Hague Protocol*, 3 Revue Générale de l'Air 239 (1956).

points in the territories of three states, all of which have ratified the Guadalajara Convention but only the first and third have ratified the Protocol. It is obvious that the "actual carrier" performing part of the carriage between the first and second states may be under a different regime than the "contracting carrier" contracting for the entire journey.

Under Article 2 of the Guadalajara Convention, if the "actual carrier" performs the whole or part of the carriage which, according to the agreement for carriage with the passenger or shipper, is governed by the Warsaw Convention, both the "contracting carrier" and the "actual carrier" shall be subject to the rules of the Warsaw Convention. But Article 2 also provides that the "contracting carrier" shall be subject to the rules of the Warsaw Convention for the whole of the carriage contemplated in the agreement and that the "actual carrier" shall be governed by these rules solely for the carriage which he performs.

In the event that the contract of carriage provides for carriage between points in states which have ratified the Protocol and the "actual carrier" performs part of the carriage between points, one or both of which is in a state which did not ratify the Protocol, the "actual carrier" may claim the application of the Warsaw rule, whereas the passenger or shipper's interest may be to apply the Protocol rule with the much higher liability limits.

The application of the Warsaw Convention to the "actual carrier" may be justified with Article 24 of the Warsaw Convention which provides in substance that any action for damages, however founded, could only be brought subject to limitations and conditions of the Warsaw Convention. The passenger, on the other hand, could claim that he has contracted under the regime of the Protocol and that the Protocol applies automatically provided that its requirements regarding geographical scope (Article 18) are fulfilled. Hence there is a dilemma created by the Guadalajara Convention resulting in apparent duality of obligations of states which have ratified all three Conventions regarding other states which have not done so. The first state has Warsaw obligations regarding the second and Protocol obligations regarding the third. When the Guadalajara Convention applies both state obligations are activated, and as the result there may be apparent conflicts between treaty obligations due to:

(i) the fact that there is a distinction in the Guadalajara Convention regarding the "contractual carrier" and the "actual carrier," whereas there is no such distinction in either the Protocol or the Warsaw Convention.

(ii) the fact that under the Guadalajara Convention both the Protocol and the unamended Warsaw Convention might apply simultaneously, one being applicable to the "actual carrier" and the other to the "contracting carrier."

(iii) the fact that in some jurisdictions the Warsaw Convention is considered to apply to contractual liability only, whereas the better view seems to be that it covers tortious and statutory liability.[16 & 17]

[16] Calkins, *The Cause of Action under the Warsaw Convention,* 26 J. of Air L. & Com. 217 (1959).

[17] Forrest, *supra* note 6.

(iv) the fact that in some jurisdictions the Warsaw Convention applies to the "actual carrier" irrespective of the Guadalajara Convention.

(v) the fact that the Guadalajara Convention does not have a provision similar to Article 18 of the Hague Protocol determining its scope of application by applying a geographical standard.

(vi) the fact that the interest of the claimant and the interest of the respondent may be diagonally opposite as regards desirability of application of the Warsaw Convention or the Protocol.

It must also be remembered that there may be further conflicts between existing laws in these states, implementing the conventions and the Protocol. Moreover, not only the limits of liability may cause conflict between the Warsaw Convention and the Hague Protocol as a result of the application of the Guadalajara Convention, but also the provisions relating to traffic documents, wilful misconduct and others. Accordingly there might be many sources which could invite the consideration of possible conflicts under the three Conventions.

It is not possible in the scope of this paper to review all these possible conflicts. For the purpose of illustrating the subject, it might be convenient again to resort to a hypothetical case; this time there are three passengers, the first has the nationality of state A; the second of state B and the third of state C. All three of them have contracted with the "contracting carrier" having the nationality of state C. The journey is from state A to a point in state B via the services of the "actual carrier" registered in state B and from the point in state B to state C via the services of the "contracting carrier." The accident giving rise to the action occurs in state A. The position regarding the Warsaw Convention, Protocol and Guadalajara Convention in this hypothetical case is that all three Conventions are in effect and state A and state C have ratified them all, but state B has only ratified the Warsaw Convention.

Actions against the "Actual Carrier" in State A. The first, second and third passengers each may take actions in state A against the "actual carrier." The wrong having been committed in state A and the action taken there, there would be no problem of jurisdiction and it is surmised that the Court will decide that the lex fori is the proper law.

The question of the nationality of the claimant or the defendant might presumably not be material in the three cases above, once the question of jurisdiction is cleared.

In order to determine the proper law, the court in state A may still have the choice under its private international law rules. It may apply the Guadalajara Convention and the Protocol. Then again, it is not inconceivable that it may apply the Warsaw Convention. To a large extent the proper law will be determined, depending on the question whether the "actual carrier" may be considered already a "carrier" under the Warsaw Convention or only under the Guadalajara Convention.

If the court in state A will be called upon to decide whether the rules of the Guadalajara Convention override the Warsaw Convention or not, the maxim of "generalia speciablibus non derogant" may have bearing on the case. Again it must be pointed out, however, that this maxim is not generally adopted in customary international law.[18]

[18] Schwarzenberger, *supra* note 7 at 472.

Obviously there may be apparent conflicting treaty obligations between state A and B, or between state A and state C. Between states A, B and C there is one treaty in existence (Warsaw Convention) and between states A and C there is another treaty in existence (Hague Protocol). Accordingly state A may find itself in conflict with state B if it applies the Protocol, or with state C if it does not.

It will be incumbent upon state A to reconcile its position under two conflicting treaties. The international law rules in this respect are not as clear as they might be. There is the doctrine of non-recognition of treaties inconsistent with previous treaties but this principle is not universally applied and it is recognized that a second treaty, although inconsistent with the first one, might not be held by an international court to be invalid if it could be shown that the interests of the complaining state are not affected at all, or that the degree to which they are affected is slight when related to the general advantage accruing from the new treaty.[19] In order to succeed, presumably the complaining state A or C would have to show that its interest is affected to a substantial extent which in the circumstances is questionable to say the least.

There may be some question of conflict between treaty obligations of states A and C, both having ratified the two treaties and the Guadalajara Convention but the better view seems to be that on the basis of "jus aequum" any such conflict would be eliminated.[20]

In any case, these conflicts, if they arise are of the same nature as the conflicts referred to in the second hypothetical case and the comments made earlier regarding them apply.

Actions Against the "Contracting Carrier" in State A. In actions taken against the "contracting carrier" by the same three passengers in state A, the matter is somewhat simplified by the fact that all passengers have contracts with the defendant carrier and that it has the nationality of state C, which has ratified all three Conventions. These actions, whether based on contract or tort are taken in the state which is the "locus delicti" and the defendant carrier might have no basis whatsoever to seek application of other rules than the Protocol-amended Convention.

One must not overlook, however, the possibility that the second passenger might wish to take advantage of Article 25 of the Warsaw Convention, instead of the amended Article 25 of the Hague Protocol. In this case then, irrespective of the fact that the jurisdiction of the court and the applicable law is clearly determined, the possibility of conflicting state obligations may arise. The foregoing comments regarding conflicts in connection with the actions against the "actual carrier" would again apply.

Actions Against the "Actual Carrier" in State C. Whilst such actions may not be frequent, one cannot overlook the possibility.

The question of jurisdiction of state C in such case is not without difficulty. Article 28 of the Warsaw Convention provides that "an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the con-

[19] Oppenheim, I International Law 652 (3d ed. 1920).
[20] Schwarzenberger, *supra* note 7 at 474.

tract has been made, or before the court having jurisdiction at the place of destination."

Article 8 of the Guadalajara Convention extends the jurisdiction at the option of the plaintiff, in addition to the four jurisdictions mentioned above, to the jurisdiction of the place where the "actual carrier" is ordinarily resident or has his principal place of business.

If the "actual carrier" is under the Warsaw Convention and not under the Guadalajara Convention, then under Article 28 he can be sued in the jurisdictions where he is ordinarily resident or has his principal place of business. Presumably, the place where the contract was made or the place of destination will not give jurisdiction to the plaintiff against the "actual carrier." If he is sued under the Guadalajara Convention, the jurisdictions are not limited to the jurisdictions where he can be sued under the Warsaw Convention but extended to all jurisdictions where the "contracting carrier" may be sued.

Not only the question of forum but also the choice of law in this situation may be more involved. It will be remembered that there are various theories under which rights created in a foreign country might be enforced in the jurisdiction of the forum.

In the United States, for instance, under the "obligatio" theory, tort liability is governed by the law of the "place of wrong," i.e., the law of the country where the alleged tort was committed.[21 & 22] The plaintiff owns something and he is helped to get it. This is done unless some sound reason of public policy makes it unwise to do so.[23]

In the United Kingdom a right of action, whether it arise from a contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but prima facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.[24]

With the foregoing in mind it is surmised that the Court in state C

[21] Falconbridge, Conflict of Laws 12 (1st ed. 1947).

[22] Slater v. Mexican Nat'l R.R. 194 U.S. 120, 126 (1904), Holmes, J. stated:

"But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously it does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

[23] Cardozo J., in Loucks v. Standard Oil Co. of New York, 224 N.Y. 99 (1918).

[24] Philips v. Eyre, [1879] 6 Q.B. 1.

might apply the law of state A in view of the fact that the contract was made there and the accident occurred there.

It must be remembered that the "actual carrier" carried the passenger between a Protocol state and a Warsaw state, hence by the terms of the Protocol, it would not apply to such carriage. Whether or not the claimant could, on the strength of his contract with the "contracting carrier," bring about the application of the Protocol, would depend on the law of the forum. This is a simple question of conflict between existing laws in the jurisdiction. Only in the event that state C would decide to apply the Protocol would the question of conflicting treaty obligation arise between state B and state C.

Actions Against The Contracting Carrier in State C. These actions again have a truly international element in that the tort that is giving rise to the actions is committed in a foreign country (in state A).

First, again the question of jurisdiction would have to be decided and secondly the law applicable to the tort. It may well be that the Court might decide that the proper law is not the law of the forum but the law of another jurisdiction, such as state A, where the contract was made; where the act was committed which has given rise to the action, or the country in which the claimant is or was domiciled. Should this last point be considered by the Court in order to determine the proper law, the nationality of the three passengers might also have a bearing on the issue.

Should the Court decide that the proper law is its own law, then presumably the Guadalajara Convention and the Protocol would apply in view of the fact that the Guadalajara Convention is in force and that the conditions of Article 18 of the Protocol have been met. The same may be the case if the Court should decide that the proper law is the law of state A which also ratified both Conventions. Conflicting treaty obligations could only arise in respect to the second passenger, a citizen of state B, which in this example has not ratified nor adhered to the Hague Protocol and the Guadalajara Convention.

Actions Against the Actual Carrier in State B. The fact that these actions are against the carrier which did not enter into contract with the passenger might have a bearing on the outcome of the conflict regarding jurisdiction. The action would presumably be based on tort or delict and not on contract. The lex loci delicti might well apply. Otherwise the position of the "Contracting Carrier" and the "Actual Carrier" in state B would be much the same as before the Courts of state B.

The different nationalities of the passengers could not produce a conflict of state obligations since state B, regarding states A and C, has only treaty obligations under the Warsaw Convention.

If there is any conflict, the conflict exists only between various systems of laws within the same jurisdiction and the Courts in state B would be well equipped to deal with such conflict for the purpose of their proper law.

Actions Against the Contracting Carrier in State B. If the Court of state B assumes jurisdiction, it might have to determine the proper law. On the basis of its conflicts of law rules it may select the law of state A or B or state C as the proper law. In the first and third instances the Hague Protocol and the Guadalajara Convention might be applicable.

Some theoretical conflicts between state obligations might again be

encountered as soon as the Guadalajara Convention applies, but might be discarded in view of the fact that the Guadalajara Convention will in these circumstances apply only on the basis of the law of the loci delicti and not on the basis of the law of the Forum.

If, under its private international law rules, state B should decide that the proper law is its own law, then the difficulties would be more obvious. The carriage in accordance with the contract is a Protocol carriage but in the legal system of state B the only convention that is applicable in the circumstances is the Warsaw Convention.

Even though the delict giving rise to the action was committed in another state, the right of action might be established in accordance with the rules of its own law and the appropriate remedies ensue.[25]

The measure of damages and the liability would be determined as if the act had occurred in state B. If the Warsaw Convention was the law of the land and if the carriage was a Warsaw carriage in accordance with the law of the forum when the Warsaw Rules might apply notwithstanding the fact that state A and state C are both parties to the Protocol and the Guadalajara Convention.

The conflicting treaty obligations presumably could not be invoked by the passengers whose state ratified or adhered to the Protocol and the Guadalajara since the state which has assumed jurisdiction has no other treaty obligations than those under the Warsaw Convention.

In all these cases the difficulties would increase immensely if state A or C, when ratifying the Protocol, had renounced the Warsaw Convention. In the actions taken in states A and C then the question would have to be determined whether or not the Warsaw Convention has any application to the international carriage. The "actual carrier" might find itself without any limitation of liability and the passenger wanting to take advantage of a more convenient jurisdiction might have to establish fault or negligence on the part of the carrier in order to succeed with his claim. The certainty and uniformity heretofore achieved would be lost.

The hypothetical cases reviewed have indicated the theoretical possibilities of:

(i) Conflicts between the national laws implementing the Warsaw Convention, the Hague Protocol and the Guadalajara Convention, notwithstanding the fact that the first two determine their geographical applications.

(ii) Conflicting obligations of states arising out of these multilateral treaties to which states have subsequently become parties.

It must be observed, however, that Article 18 of the Protocol will probably avoid the ordinary conflict of law problems between the majority of cases, but the cases of conflicts arising if a state should renounce the Warsaw Convention when ratifying the Protocol, theoretical as they may sound, cannot be overlooked in view of the fact that at least two states[26] are planning to introduce legislation which, in effect, would limit the application of the implementing legislation to Hague Protocol carriage. In other words, the Warsaw Convention, as far as these countries are concerned, might not be in existence. This position, if carried out, will

[25] Machado v. Fontes [1897] 2 Q.B. 231.
[26] Canada and the United Kingdom.

no doubt simplify some conflicts to which reference has been made earlier but will introduce new and more difficult situations.[27]

While, theoretically, conflicting treaty obligations may arise under the Protocol and the Warsaw Convention under the terms of the Guadalajara Convention, it is submitted that they should have little or no practical significance for the following reasons:

(i) These conflicts are theoretical rather than real.

(ii) It would be difficult to convince a state to insist that another state should do more under a multilateral international treaty affecting civil rights, than to make it effective in the jurisdiction.

(iii) It would be equally difficult to seek remedy from a state which ratified a multilateral treaty affecting the civil rights of individuals and created thereby conflict under its own laws.

(iv) It would be difficult for a state, signatory to a later convention which it has not yet ratified, to insist that another state, which already ratified the convention, is in breach of a previous convention which the parties intended to amend with the subsequent convention.

(v) It might not be easy to exercise any right under existing treaty obligations because the scope of the courts in the various jurisdictions may not be broad enough to entertain such rights.

(vi) The applicable private international law rules would satisfactorily resolve any conflicts in most jurisdictions.

In view of the foregoing it is hoped that no state will find it necessary to resort to the renunciation of the Warsaw Convention in connection with the ratification of the Protocol for the purpose of avoiding the theoretical conflicts of state obligations.

International law rules, vague as they are, may explain the lack of precision in this paper. It is hoped that the foregoing casual excurions, notwithstanding the lack of experience of the writer in the complex field of the law of conflicts and international obligations of states regarding private law treaties, will stimulate the thoughts of those who are presently considering the problem of ratification of the Guadalajara Convention or the Hague Protocol and who are troubled by the thoughts of conflicts between treaty obligations and the practical significance of such conflicts.

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[27] Makiewicz, *supra* note 15.

THE LEGAL STATUS OF CELESTIAL BODIES

By Dr. Michel Smirnoff†

RECENT development in the field of astronautics pose many legal problems connected with the space flights. In a very short time the dreams of Jules Verne have become reality and lawyers now have to face many problems which some years ago seemed remote. Particularly in the last two or three years one problem has become more and more fascinating and has come to occupy more and more of the time of the outstanding lawyers in the field. It is the problem of the legal status of celestial bodies.

With the successes of space flights and especially with the landing of a Russian speceship on the Moon it became clear that the landing of manned space vehicles on the Moon and other planets is only a question of time and financial resources. This fact showed clearly that the problem of the legal status of celestial bodies becomes one of the most important problems of Space Law. There are many reasons why this problem grew up to such an important issue. In a paper read before the Washington Colloquium on the Law of Outer Space[1] we spoke of this aspect of Space Law as being one of the most important reasons to create a friendly atmosphere among the peoples on Earth. As a matter of fact this problem is closely connected with the possibility of finding some living beings on planets. This could lead to two kinds of situations. In one variant we could find on the planets living beings of very low grade of civilization or without civilization, and our role would be to unite and to play the role of guide to such beings. In the other variant we could find there living beings whose civilization could be on a very high level. This means that those beings could be much stronger than we are. In this case mankind must be united to defend itself from those living beings from other planets, or at least to be able to represent the united community of Earth. Those ideas were marvellously presented in Washington at the IVth Colloquium on the Law of Outer Space by Professor Harold Lasswell.[2]

The other reason or set of reasons why the problem of the legal status of the celestial bodies became so important is much more trivial. As a matter of fact there is a definite possibility of finding rich metals, minerals and other deposits highly useful to mankind. It is very important, therefore, even now when no manned space vehicle has landed on a planet to find a legal system which will be able to prevent the propagation of the rivalries between the peoples on Earth throughout the Universe. It is quite obvious that the fact that if a country on Earth sends their citizens to the planets with the wish to occupy them for that country such action will immediately provoke suspicions of all other countries and undoubtedly could lead to serious conflicts in space.

But there are many other reasons which speak in favor of a legal regulation of the status of celestial bodies. It is obvious that it would

† Member of the International Astronautical Academy; member of the Board of Directors of the International Institute of Space Law.

[1] Smirnoff, *Space Law as an Element of Understanding Among the Peoples on Earth,* Paper presented at the IVth Colloquium on the Law of Outer Space, Washington, October 3, 1961.

[2] Lasswell, *Anticipating Remote Contingencies: Encounters with Living Forms,* Paper presented to the IVth Colloquium on the Law of Outer Space, Washington, Oct. 3, 1961.

be very dangerous if the celestial bodies could become a potential battlefield for future conflicts between the peoples on Earth. One could easily imagine the dangers which could come out of such a situation. The neutralization of celestial bodies is therefore a postulate formulated by many scholars.[3]

From the other side the utilization of the planets for the benefit of all mankind presupposes the unity of that mankind and an agreement on a broad international basis to enable mankind to use the unknown richness of the celestial bodies. Enormous effort and incredibly large cost must be incurred to utilize those bodies for the benefit of all the human race. Many other reasons exist which argue in favour of such an agreement. The scientific data which could be obtained for the studies on the planets could be of a very high value for humanity. The peaceful uses of planets for scientific exploration could open new horizons for mankind. Those reasons are very numerous and some authors quote the possibility of using the planets for stockpiling atomic bombs or fission dust. We hope that it will never be necessary to use the celestial bodies for such purposes. One thing is sure. Interest in the celestial bodies grew up to limits which were never anticipated in this respect.

A problem now arises before the lawyers which urgently requires some solution. This problem is the following: what will be the legal status of celestial bodies which will provide the best solution of the questions raised, giving satisfaction to all interested in the problem.

There are many proofs of the interest for this problem which exists all over the world. In the Report which I presented as Chairman of the Working Group III of the International Institute of Space Law, in 1961 for the Washington Colloquium, I quoted fifty-four works of the well known lawyers[4] all dealing with the problem of legal status of the celestial bodies. In my Report which I prepared for the Sofia Colloquium in 1962 the number of those works grew considerably. Many international organizations concerned with the legal problems of Outer Space put the problem of the legal status of celestial bodies on their agenda. It is enough to mention such organizations as International Law Association, International Astronautical Federation, American Bar Association, Societe Francaise de Droit Aerien, Centre d'Etudes du Droit de l'Espace et de l'Astronautique, etc. In Washington, in October, 1961, three papers dealt directly with the problem of legal status of celestial bodies,[5] and many other treated this problem incidentally in their papers. The largest efforts expended were those of the III Working Group of the International Institute of Space Law which worked on a final resolution in this field for the Sofia Colloquium on the Law of Outer Space. This group enjoys the

[3] Meyer, *Exploration of Outer Space and Neutrality,* Paper presented to the IVth Colloquium on the Law of Outer Space, Washington, Oct. 3, 1961; Korovine, *O Neytralizacii i Demilitarizacii Kosmosa* (On the Neutralization and Demilitarization of Outer Space), 5 Mezhdunarodnaya Zhizn 109-10, Moscow, Dec. 1959; Kopal, *The Legal Problems of Demilitarization and Neutralization in Outer Space,* Paper presented at the IVth Colloquium on the Law of Outer Space, Washington, Oct. 3, 1961; De Nova, *War in Outer Space and Neutrality,* Paper presented to the Congress for Space Law in Taormina, Italy, Nov. 2, 1960.

[4] *Report of the III Working Group on the problems of the legal status of celestial bodies,* presented by the Chairman of the Group, Dr. Michel Smirnoff to the IVth Colloquium on the Law of Outer Space, Washington, Oct. 4, 1961.

[5] They were the papers of: Fasan, *The Legal Nature of Celestial Bodies,* Menter, *Jurisdiction Over Land Masses in Space,* Verplaetse, *Can Individual Nations Obtain Sovereignty Over Celestial Bodies?*

Collaboration of such outstanding international lawyers as the Prince of Hannover, Aldo Armando Cocca, Philip B. Yeager, Dr. Fasan Gonzaga de Bevillaqua, E. Faria, and many others.

The great interest of the lawyers and lawyers' organizations proves clearly that the time has come when a solution for the problem of legal status of celestial bodies must be found. Many lawyers have expressed their opinions and extended their concrete propositions in this respect. Our task in this paper will be to offer a retrospective analysis of those opinions. We are very happy to make this analysis in a volume which includes a set of articles in honour of one of the best known lawyers in the world in the field of air and space law, Professor John Cobb Cooper. One cannot forget that it was Professor Cooper who, in an outstanding paper presented to the Stockholm Colloquium on the Law of Outer Space,[6] told about "means of preserving the legal status of outer space and of celestial bodies against new or expanded claims of national sovereignty."

There are three considerations which must be always taken in account in any analysis of the theories of the legal status of celestial bodies. Those three considerations are present in almost all of those theories and they explain many things in those theories. They are:

1. *The novelty of the matter:* The sum of knowledge which we now possess about the celestial bodies is very small despite the fact that much new information is being given to us by the data supplied by satellites and rockets. Therefore, the first consideration which every lawyer must face if he wants to deal with the problem of the legal status of celestial bodies is this novelty of matter, or the difficulty which exists in applying the classical legal notions such as sovereignty, occupation, discovery and so on to the celestial bodies. In the course of our analysis we shall often see how application of the classical forms to celestial bodies frustrates the whole system of legal thinking. In any event, this first consideration forces the lawyers to be extremely careful in applying the classical legal notions and forms to the legal status of celestial bodies.

2. *The political aspect of the problem:* We already spoke about the great interest which all peoples on Earth have shown in celestial bodies. This material interest gives to the whole subject a purely political issue which is detrimental to the purely legal aspects of the problem. Therefore initiative at the level of the intergovernmental organizations such as United Nations in this respect has been very slow. Because of the political interests involved those organizations advanced very carefully. We are quite aware that the political atmosphere surrounding the problem of celestial bodies will present serious difficulties. However, it must not stop the action of lawyers in their efforts to find a solution.

3. *The interplanetary character of this problem:* The fact that celestial bodies operate outside terrestrial limits and are dealing with conceptions which are outside of that normal frame of reference gives this problem a specific character. This specific character is what Professor Valladao referred to as the necessity to create a "Jus Inter Gentes Planetarium."[7] We

[6] Cooper, *Air Sovereignty and the Legal Status of Outer Space*, Statement of Prof. Cooper for the Hamburg Conference, 1960, of Int'l L. Ass'n, p. 1.

[7] Valladao, *Droit interplanetaire et droit inter gentes planetaires*, 1960 Internationalrechtliche und staatarechtliche Abhandlungen 473-96.

have already told about the possibility of finding some living beings on planets which could in one moment completely alter all of our efforts to find a solution for the legal status of celestial bodies. It is enough to remember the words of Mr. Andrew Haley, one of the pioneers in the science of Space Law when he says that the fact that some living beings exist on planets presupposes some kind of invitation to Earth spaceships to visit the planet.[8] It is quite clear that with such ideas we are coming into a sphere of interplanetary solidarity which in turn presupposes some interplanetary accords which would be based on principles which probably will not be exactly the same as those on which our terrestrial international agreements are based. The interplanetary aspect of this problem must never be forgotten if we want our efforts to be real.

Passing to the analysis of the theoretical battle which is now fought all over the world about the problem of the legal status of celestial bodies we must say that the first works in this sense were devoted to the legal status of our natural satellite, the Moon. But very soon lawyers began to speak of celestial bodies in general as a notion which encompases all the celestial bodies.

In a Bibliography which we attach to this article it is clearly shown that the literature about the legal status of celestial bodies comes from all over the world; spectacular proof of the interest in that problem which exists in all countries of the world.

We must say immediately that the theories advanced in this matter vary greatly depending on the approach taken and solutions proposed. However, we found in almost all these theoretical viewpoints the presence of the three considerations which we noted earlier. In many of the theories the conviction is present that our law of the Earth is in some way different from Space Law. We quote a German lawyer, Mr. Adrian Buckling, who, in one of his works, draws a vivid picture of Space with all its specific characteristics which differs completely from the situation on Earth. Coming back to the law problems Mr. Buckling concludes: "Unser irdisches Recht kann in der Tat nicht anders als eine Funktion der Erde begriffen werden."[9] This same idea struck us on reading the works of an American lawyer, Mr. Philip B. Yeager, when he spoke about the future space law; saying: "Extraterrestrial law, when it becomes reality, will have to develop on the basis of what is, not what has been or even in accordance with doctrines to which we on Earth are accustomed."[10]

The basis for those conclusions is the nature of Space which is quite different from the nature of Earth. Space is something that we know very little of and something which is enormously greater in dimensions than the relations on Earth. Although this difference in dimensions is one of the main reasons for the differences which exist between the Earth and the Space, there are many other reasons for that difference. We can only mention the conditions of life on the planets, their unknown resources, etc., which is all based on the substantial fact that we know very little about the planets and Space in general. Only taking in account those

[8] Haley, *Can Russia Claim the Moon?*, The Am. Weekly 2 (in the Washington Post, Times Herald) (Jan. 19, 1958).

[9] Buckling, *Gebietshoheit über Himmelskorper*, 12 Oesterreichisches Juristen Zeitung 319.

[10] Yeager, *The Moon—Can Earth Claim It?*, Legal Problems of Space Exploration 757, Washington (1961).

preliminary considerations we can pass to our analysis of the theories advanced in this matter.

One of the characteristics of almost all the works dealing with the legal status of celestial bodies is that they had two cornerstones on which the works were generally based. Those cornerstones were broadly interdependent, one on the other, so that practically the solution of one of those main problems influenced the solution of the other: Almost every work on the legal status of celestial bodies begins by applying the classical terms of *res nullius* and *res omnium communis* to those bodies. Depending on what solution the writer proposed in this respect he has fixed the conclusions to be arrived at in the other cornerstone problem, *i.e.*, whether the occupation of celestial bodies was possible or not. The conclusions in this second problem are linked with all sorts of author's conclusions about the problem of the sovereignty of the individual countries on Earth over celestial bodies. Only in recent times have some authors begun to speak about the futility of applying those terrestrial conceptions to the celestial bodies. In this respect we must especially quote the Prince of Hannover[11] and Mr. Nicholas Poulantzas[12] who are now proposing not to apply the terms of *res nullius* or *res communis omnium* to celestial bodies which could frustrate and give what the others would argue are erroneous conclusions in the matter of celestial bodies. An almost identical idea was advanced by the United Nation's Ad Hoc Committee on the Peaceful Use of Outer Space in 1958 during the first debate in the General Assembly on the establishment of that Committee.[13] However, in the majority of cases the authors have accepted these premises in formulating their ideas about the legal status of celestial bodies, and for the sake of a systematization of those divergent opinions we shall group the authors in three groups: those who are claiming that the celestial bodies are *res nullius*, those who are saying they are *res communis omnium*, and those who have an intermediate opinion not clearly for one or the other solution. At the end, we shall see the argumentation of those rare authors who are thinking that the notions of *res nullius* or *res communis omnium* are not appropriate at all in this scientific discussion.

We must bear in mind that a very serious conclusion is the necessary consequence of the adoption of either of those theories. As a matter of fact, if some authors admit that the celestial bodies are *res nullius* and therefore capable of being occupied or discovered, then they admit the possibility of the creation of a title of individual right of sovereignty on the celestial bodies. This is a very grave consequence of that purely scientific method of thought, and this consequence leads to the logical conclusion that the sovereignty right of an individual state or even the title to the possession of the celestial body or of its part for the benefit of a society or individual person discovering or occupying the celestial body does exist in the arsenal of legal notions. Before we proceed to the analysis of those opinions we must say that there are many more scientists who are denying the possibility of an individual occupation of the celestial

[11] Prince of Hannover, Heinrich Welf, *60 Jahre Recht Zwischen Erde und Weltraum*, Vortag in Celle am 27 Nov., 1961, p. 16-22.

[12] Poulantzas, *Imperium or Dominium*, Paper presented to the IVth Colloquium on the Law of Outer Space, Washington, Oct. 1961.

[13] U. N. General Assembly's First Collective Debate on the Establishment of the Ad Hoc Committee on Peaceful Uses of Outer Space. A/C 1/Pv. 994 (Nov. 12-24, 1958).

bodies. The great majority of lawyers today admit that the celestial bodies are *res communis omnium* and therefore that they are not capable to be occupied by an individual state, society or person. We quote Faria,[14] Goedhuis,[15] Keating,[16] McDougal and Lipson,[17] Meyer,[18] Pepin,[19] Rode-Verschoor,[20] Buckling,[21] Valladao,[22] Smirnoff[23] and many others.[24] Although the arguments of all those scientists are not the same, they all support the theory of the non-occupability of the celestial bodies and the impossibility of applying to the conditions on the celestial bodies the "Earth-bound principles and legal precedents in determining the validity of future territorial claims to celestial bodies."[25]

The diversity of those arguments is very interesting and we should remind the reader that many of the lawyers quoted, like Faria and Goedhuis, use the example of the Antarctic Treaty 1959 to show the identity of reasons which do not admit the claims of the sovereignty of Earth countries to celestial bodies. Others like Professor Meyer think that "der Himmelaraum und die in ihm befindlichen Himmelskorper sich als eine Sache darstellen die der Gesamtheit aller Mitglieder der menschlichen Gesellschaft gehorten."[26] Dr. Faria goes a step further and adds "and also to all rational creatures of other civilized planets."[27] Jessup and Taubenfeld and also Smirnoff advocate an international solution without any right of sovereignty of individual States but with the competence of the Specialized Agency of the United Nations.[28] Buckling talks about the "Interplanetarisches Kooperationsrecht"[29] and Valladao is proclaiming the creation of the "Jus Inter Gentes Planetarum."[30] Col. Menter is for the international regime of the celestial bodies with the jurisdiction of United Nations over those bodies.[31] Mr. Quigg seeks international control for the

[14] Faria, *Draft to an International Covenant for Outer Space*, Paper presented to the III Colloquium on the Law of Outer Space, Stockholm, Aug. 16, 1960.

[15] Goedhuis, *Air Sovereignty and the Legal Status of Outer Space*, Report to ILA Conference in Hamburg, Aug. 1960.

[16] Keating, *The Law and the Conquest of Space*, 25 J. Air L. & Com. 191-93 (1958); Keating, *Reaching for the Stars: Space Law and the New Fourth Dimension*, 45 A.B.A. J. 54-57 (1959).

[17] McDougal and Lipson, *Perspectives for a Law of Outer Space*, Legal Problems of Space Exploration 417, Washington (1961).

[18] Meyer, *Volkerrechtliche Probleme des Weltraumgebiets*, 1960 Internationalrechtliche und staatsrechtliche Abhandlungen 326.

[19] Pepin, *Introduction to Space Law*, 4 N.Y.L.F. 258-62 (1958).

[20] de Rode-Verschoor, *Inleiding tot het Luchtrecht*, 1960 Haarlem 171.

[21] Buckling, *supra* note 9.

[22] Valladao, *The Law of Interplanetary Space*, Paper presented to the Second Colloquium of the Law of Outer Space, London, 1959, Proceedings 156-68, Springer Verlag, Vienna (1960).

[23] Smirnoff, *The Role of IAF in the Elaboration of the Norms of Future Space Law*, Proceedings of the Second Colloquium on the Law of Outer Space, London, 1959, p. 147-55, Springer Verlag, Vienna (1960).

[24] For the other authors who dealt in their works with the problems of the legal status of the celestial bodies we are directing the readers to two excellent and well documented works: Lipson and Katzenbach, *The Law of Outer Space*, Report to the National Aeronautics and Space Administration, Project Reporters for the American Bar Foundation; Finch, *Territorial Claims to Celestial Bodies*, Legal Problems of Space Exploration 626-36h, Washington (1961).

[25] Finch, *supra* note 24, at 636q.

[26] Meyer, *supra* note 18, at 327.

[27] Escobar, *supra* note 14, at 1.

[28] Jessup and Taubenfeld, *Controls for Outer Space*, Legal Problems of Space Exploration 553-70, Washington (1961); Smirnoff, *supra* note 23, at 151.

[29] Buckling, *Interplanetarisches Kooperationsrecht*, 55 Die Friedenswarte 305-16, (1960).

[30] Valladao, *supra* note 22, at 473.

[31] Menter, *Astronautical Law*, Industrial College of the Armed Forces, Washington, D. C. Student Thesis (1959).

Moon but does not think that it could be treated like Antarctica.[32] Mr. Weinmann makes a very substantial argument against the possibility of the notion of discovery as applied to the Moon for the simple reason that everybody can see the Moon every night.[33]

But the arguments which persuaded us the most were those advanced by McDougal and Lipson parting from the idea that any claim to the celestial bodies "will carry a promise of reciprocity, combined wherever possible with latent or expressed threats of retaliation or reprisal"[34] or by Mr. Keating when he says "that the present rules of discovery and occupation cannot be applied to celestial bodies without increase of risks of war."[35] We advanced the same arguments in our paper presented to the IVth Colloquium on the Law of Outer Space in Washington in October, 1961.[36]

Although the group of the lawyers which advocate the impossibility of the occupation of the celestial bodies is large we must say that some very prominent lawyers have an opposite opinion, and many of them think of celestial bodies as being totally or partially *res nullius, i.e.*, capable of being occupied. We include in this group Mr. Andrew G. Haley,[37] the American pioneer of the Law of Outer Space, Mr. Oscar Schachter,[38] Julian Verplaetse,[39] Mr. Charles Rhyne,[40] Mr. Rehm[41] Mr. Woetzel,[42] Mr. Potter[43] and others. The arguments of the authors in this group vary greatly. In his very interesting statement at the VIIIth International Congress of Astronautics in Barcelona[44] and in many of his numerous articles,[45] Mr. Haley declared that the Moon is a free territory or zone, independent and autonomous. But a valid claim of sovereignty must involve: (1) planting a flag on the moon's surface, (2) sending men in a rocket to look at the other side of the moon, and (3) landing a small colony on the moon. If in his above mentioned works Mr. Haley is admitting the possibility of certain occupation of the celestial bodies we cannot forget that Mr. Haley elsewhere[46] wrote the following extremely human words:

> in any instance where there is reason to believe that intelligent life exists on a planet, no earth spaceship may land without having satisfactorily ascer-

[32] Quigg, *Open Skies and Open Space*, 37 Foreign Affairs 95-106 (Oct. 1958).
[33] Weinmann, *The Law of Space*, 35 Foreign Service J. 2, 22-25 (April 1958).
[34] McDougal and Lipson, *supra* note 17, at 417.
[35] Keating, *The Law and the Conquest of Space*, 25 J. Air L. & Com. 191-93 (1958), as quoted by Lipson and Katzenbach in Legal Problems of Space Exploration 845, Washington (1961).
[36] Smirnoff, *supra* note 1.
[37] Haley, *Space Law—The Development of Jurisdictional Concepts*, Proceedings of the VIIIth International Astronautical Congress, Barcelona, 1957, p. 170, Springer Verlag, Vienna, (1958). *Can Russia Claim the Moon?*, *supra* note 8; *Space Law—Retrospect and Promise*, Paper presented at the XIVth Annual Meeting of the American Rocket Society, Washington, Nov. 16-20, 1959.
[38] Schachter, *Who Owns the Universe?*, Across the Space Frontier 118-31, Viking Press, New York (1952).
[39] Verplaetse, *International Law in Vertical Space* 507, Madrid (1960).
[40] Rhyne, *The Legal Horizons of Space Use and Exploration*, 104 Congressional Record 6152-55 (April 22, 1958).
[41] Rehm, *Gebietserwerb im Weltraum*, 1960 Zeitschrift fur Luftrecht und Weltraumrechtsfragen 1-10.
[42] Woetzel, *Die Internationale Kontrolle der hoheren Luftschichten und des Weitraums* 97, Bad Godesberg (1960).
[43] Potter, *Moon-Usque ad coelum?*, 1 Boston B. J. 28 (Nov. 1957).
[44] Haley, *Space Law—The Development of Jurisdictional Concepts*, *supra* note 37.
[45] Haley, *Can Russia Claim the Moon?* and other articles *supra* note 37.
[46] Haley, *The Law of Outer Space—Scientific and Anthropocentric Considerations*, Space Law—a Symposium 441, Washington (1959).

tained that (1) the landing and contact will injure neither the explorer nor the explored and (2) until the Earth ship has been invited to land by the explored.

Mr. Schachter admits some rights of property in mineral resources of the planets without requiring national sovereignty over the body itself,[47] not treating the celestial bodies as *res nullius*.[48] Mr. Verplaetse on the contrary thinks that the celestial bodies are *res nullius* and they can be occupied either by wars or by agreements.[49] For Mr. Rehm the partial occupation of celestial bodies is possible but it must have some relationship to the importance and bigness of the State which is doing occupation. Mr. Rehm thinks that the rules of international law must also be applied in Outer Space. But his conclusion is in favor of an international agreement on celestial bodies under the auspices of the United Nations.[50] Mr. Horsford offers a very interesting argument in supporting the thesis of the occupation of the celestial bodies. For him the right to assert sovereignty would be an incentive to explore and develop the celestial bodies, and the requirements of occupation and control have to be relaxed somewhat when claim is made to a distant uninhabited planet.[51] For Mr. Jacobini the traditional conditions of acquisition of new territory will apply on the Moon. The ability to colonise is not even necessary, so long as the state has the ability to withstand counterclaims and maintain order.[52] In the opinion of Mr. Charles Rhyne actual settlement on celestial bodies must follow the occupation and discovery, which are not alone sufficient to create a valid claim to sovereignty. But Mr. Rhyne indicates that if men find some human beings on planets the relationship of men to those beings must always be based on a policy of fairness and reason.[53] In this respect Mr. Haley develops the theory of Metalaw with its main principle: Do unto others as they would have you do unto them.[54] For Mr. Potter the perfect title to the sovereignty on the Moon involves a long range program of elaborate exploitation of resources on the Moon, so that planting of flags and landing of rockets and scientific exploration teams will not suffice.[55]

The next group which must be considered is a group of scientists who stand a little aside of the first two groups. Following the classification given by Dr. Ernst Fasan in his excellent paper[56] we come to a group of lawyers who especially treated the problem of the legal status of the Moon. There are some very well known lawyers like Professor Arnold Knauth,[57]

[47] Schachter, *supra* note 38, at 11.

[48] Schachter, *Legal Aspects of Space Travel*, 11 J. of the British Interplanetary Soc'y 14-16 (Jan. 1952).

[49] Verplaetse, *op. cit. supra* note 39, at 161.

[50] Rhem, *supra* note 41, at 3.

[51] Horsford, *The Law of Space*, J. of the British Interplanetary Society 144-50 (May-June 1955).

[52] Jacobini, *Effective Control as Related to the Extension of Sovereignty in Space*, J. of Public Law 97-119 (Spring, 1959).

[53] Rhyne, *supra* note 40, at 6153.

[54] Haley, *Space Law and Metalaw—A Synoptic View*, Proceedings of the VIIth Int'l Astronautical Cong. 435-50, Rome (Sept. 17-22, 1956).

[55] Potter, *supra* note 43, at 28.

[56] Fasan, *The Legal Nature of the Celestial Bodies*, Paper presented to the XIIth Int'l Astronautical Cong., Washington (1961).

[57] Knauth, *If We Land There Soon, Who Owns the Moon?*, 45 A.B.A.J. 14-16 (Jan. 1959).

Mr. Philip Yeager,[58] Professor A. A. Cocca,[59] Professor Gerd Rinck[60] and the others. The opinion of the late Professor Knauth is that the Moon, being an Earth satellite, is constantly under the different right of sovereignty of some States on the Earth owing to the fact of the rotation of the Moon around the Earth. Therefore, it is by the astronomical realities impossible to find out a logical system of individual Earth State sovereignty. Mr. Yeager admits the real possibility of the occupation of the Moon by an Earth State, but his opinion is that "the solution of the sovereignty problem must eventually lie in cooperative or reciprocally aided exploration programs."[61] Professor Cocca's well known ideas about the legal status of the Moon are "that the Moon is free for utilization by the States of the Earth, that regarding the exploitation of its natural resources the procedure shall be the same as that governing the exploitation of the resources of the high seas and that, with regard to interplanetary travel and in view of its position as a natural satellite, a Right of Way is to be established on the Moon for States of the Earth."[62] Professor Rinck is of the opinion that theoretically the celestial bodies are *res nullius* and therefore the theoretical possibility of an occupation does exist. But in Hamburg during the ILA Conference and in Stockholm during the III Colloquium on the Law of Outer Space in 1960, Professor Rinck argued for an international agreement to prevent such an occupation.[63]

There is another group of scientists who are in favor of a system of absolute freedom regarding the celestial bodies. The representatives of that group are two well known French lawyers, Robert Hombourg[64] and Professor Charles Chaumont.[65] Although we are in favor of their theoretical premise, we think that it is too dangerous in the situation today to establish a system of absolute freedom which could be the beginning of all kinds of conflicts.

Some very interesting arguments were advanced by Mr. Jenks, Mr. Becker, Mr. Danier, Mr. Huss, Mr. Mellor, Mr. Whipple, Mr. Katz Sidney, Mr. Aaronson, Mr. Clarke, Mr. Kroell and others. We shall very shortly give an account of these arguments. Professor Jenks thinks of celestial bodies as of the *res extra commercium*[66] and his opinion is that "space beyond the atmosphere cannot reasonably be regarded as a *terra nullius*." If he admits in principle the possibility of certain adventurers launching some private enterprises in space and on celestial bodies. Mr. Jenks explicitly asks for the international control of such adventurers.[67] Mr. Jenks also advanced a very interesting idea of an agency of the United Nations

[58] Yeager, *The Moon—Can Earth Claim It?*, *supra* note 10.

[59] Cocca, *Principles for a Declaration with Reference to Legal Nature of the Moon*, Proceedings of the Ist Colloquium on the Law of Outer Space, The Hague 1958, p. 34-37, Springer Verlag, Vienna (1959).

[60] Rinck, *Recht in Weltraum*, 1960 Zeitschrift fur Luftrecht und Weltraumrechtsfragen 191-208.

[61] Yeager, Letter to Dr. Michel Smirnoff from June 2, 1961, published in the Report of the III Working Group of the Institute of Space Law to the Washington Congress, October 1961.

[62] Cocca, *supra* note 59, at 37.

[63] Rinck, *supra* note 60, at 197.

[64] Homburg, *Introduction au droit de l'Espace*, 1960 Revue Generale de l'Aire 14.

[65] Chaumont, Le droit de l'Espace 99, Paris (1960).

[66] Jenks, *International Law and Activities in Space*, Space Law—a Symposium 90, Washington (1959).

[67] Jenks, *The International Control of Outer Space*, Paper presented to the IIIrd Colloquium on the Law of Outer Space during the XIth Ann. Cong. of the Int'l Astronautical Federation, Stockholm, 1960.

being vested with the title to any natural resources found on celestial bodies and the authority to authorize the exploitation of such resources on the basis of concessions or licenses.[68] For Mr. Jenks the problem of living beings on planets is too remote to be seriously considered now.[69]

For Mr. Becker, the rules of international law could not be applied to the problem of legal status of celestial bodies either by analogy with high seas or with *terra nullius*. New rules must be created but only after considerable time during which the policy of "wait and see" is recommended.[70] As with Mr. Becker, the Antarctica example is also quite acceptable for the French lawyer Mr. Danier.[71] Mr. Huss expressed an opinion that possession is not necessary to claim sovereignty over the celestial bodies. For him the fact that the United States in 1946 had some radar contacts with the Moon entitled the United States to claim sovereignty on the Moon. This opinion was promptly attacked by a Russian scientist Professor A. A. Blagonravov, denying the right of sovereignty and occupation of the Moon.[72]

The French lawyer, Mr. Mellor, attaches a very great importance to the economic moments in space exploration with the aim to discover some new riches. He expects the interplanetary flights will bring new notions in the private law, criminal law and property law.[73] Mr. Whipple argues that the Moon must be explored before the nuclear bombs should be exploded there.[74] For Mr. Katz Sydney the Moon is a "common world territory" under the administration of United Nations.[75] For Aaronson[76] the sole relevant law to a claim to the Moon would be "that provided through the medium of international law-making treaties."

One of the earliest lawyers who dealt with the problems of Space, Mr. Arthur Clarke presupposes the possibility of a collaboration of the men from different Nations in the exploration of celestial bodies.[77] He thinks that the activity of men on planets will be scientific and not imperialistic. Mr. Kroell, an outstanding authority in the classical air law, stated[78] in an article that the living beings on planets could not be placed under the norms of our terrestrial law either for their interrelations or for the relations between them and the men from the Earth. In a great number of remarkable articles about the problems of Space Law, Mr. William A. Hyman, one of the authors of Magna Charta of Space, argues for the system in which no national sovereignty could be extended in Space. He suggests that if national sovereignty of any State extends indefinitely upward chaos in outer space must follow.[79]

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[68] Jenks, *supra* note 66.

[69] Wilfred Jenks quoted by Lipson and Katzenbach, *supra* note 24, at 848.

[70] Becker, *The Control of Space*, 39 Dep't of State Bull. 415-20 (Sept. 15, 1958).

[71] Danier, *Les Voyages Interplanetaires et le Droit*, 15 Revue Generale de l'Air 422-25 (1952).

[72] Huss, *Let's Claim the Moon Now*. Mechanix Illustrated 70-72, 160 (February 1957); and the reply from Blagonravov, "Mechaniz Illustrated zayavlyayet pravo no Lunu" (Mechanix Illustrated Claims a Right to the Moon), 29 Ogonek 22 (July 1957).

[73] Mellor, *Astronautique et le Droit*, 18 Revue Generale de l'Air 399-408 (1955).

[74] Whipple, *The Coming Exploration in Space*, Saturday Evening Post, (Aug. 16, 1958).

[75] Katz Sydney, *Who Owns Space?*, Maclean's Canada's Magazine 13 (Jan. 18, 1958).

[76] Aaronson, *Earth Satellites and the Law*, 220 The Law Times 115-16 (Aug. 26, 1955), as quoted by Katzenbach and Lipson, *supra* note 24, at 848.

[77] Clarke, *On the Morality of Space*, 40 Saturday Rev. of Literature 8-10 (Oct. 5, 1957).

[78] Kroell, *Elements Creauteurs d'un Droit Astronautique*, 16 Revue Generale de l'Air 222-45 (1953).

[79] Hyman, Wanted—a Policeman for Outer Space 2, New York (1962), quoting Cooper, *Outer Space and the Law*, Astronautics 65 (Oct. 1961).

We are sure that our list of authors who have made statements about the legal status of celestial bodies is not complete. It is obvious that in so short an article it is quite impossible to quote all the authors who have written about this problem. However, this work is written with the aim of quoting at least representative members of all the different groups of opinions in this respect. For this reason we shall finish our retrospective analysis with some words about the authors from USSR and Eastern European countries who have referred to the legal status of celestial bodies. The first thing to say about the authors from that area is that very few of them treated this problem at all. In the early works of authors like Zadorozhny[80] or Galina[81] we could not find any hint in this respect. Even by the later works of Korovine, Zhukov, Osnitzkaya, Pobedonoscev, Kovalev, Tchuproy from USSR, and Milde, Zourek, Kopal from Czechoslovakia, Reintanz from Eastern Germany, Gal from Hungary, Zylicz, Sztucki, Machovski from Poland, Gabrovski, Marcoff from Bulgaria we found only a very few works dealing with the problem of celestial bodies and their legal status. We shall quote the Member of Soviet Academy of Sciences, Professor E. A. Korovine, speaking about the problem of the relations of the peoples on Earth with the dwellers from other planets and denying the right to colonize the living beings "on a lower level of development than the human race." Professor Korovine suggests however that before tackling the question of our relations with the dwellers of other planets the human race should concentrate on establishing order in its own house."[82] Mrs. Osnitzkaya says that:

> in order to avoid any possibility of rivalry between states which would be fraught with the threat of a new war, it should be possible to establish that a landing on the Moon, or in future on any other planet, gives no basis for territorial claims. Finally, it is considered to be indisputable that, in accordance with the general rule prohibiting war, planetary bodies must not be utilized for military operation.[83]

From Eastern European writers we quote the Hungarian author, Mr. Gyula Gal who insists that it is absolutely necessary to prevent cosmic imperialism. Mr. Gal is in complete accord with the official Soviet thesis that claims should not be raised for the territories on planets.[84] The Eastern German author, Mr. Reintanz, is even more clear when he says: "it is necessary to prevent cosmic imperialism. The race would start with the conquest of the Moon, then of Mars and Venus, since no one would want to be left out of the sharing of interplanetary space."[85] The Czechoslovakian lawyer, Mr. Kopal, although repeating the Soviet point of view, which consists in renunciation of sovereignty over Antarctica and over celestial bodies, points out "that the Soviet Union has not re-

[80] Zadorozhny, *The Artificial Satellite and International Law*, Sovetskaya Rossiya, Oct. 17, 1957, translated by Anne M. Jonas, The Rand Corporation, T-78, Nov. 12, 1957.

[81] Galina, *The Equal Collaboration in the Peaceful Use of Cosmic Space*, Izvestiya, Sept. 17, 1958, p. 5, translated in Space Law—A Symposium 515 (1959).

[82] Korovine, *On the Neutralization and Demilitarization of Outer Space*, Int'l Affairs 82-83 (Dec. 1959).

[83] Osnitzakaya, *International Law Problems of the Conquest of Space*, Sovetzkiy Ezhegodnik Mexhdunarodnogo Prava 65-71 (1959).

[84] Gal, *Air Space and Outer Space*, Legal Problems of Space Exploration 1154-56, Washington (1961).

[85] Reintanz, *Air Space and Outer Space*, 11 Sprawy Miedzinarodowe, No. 12 (Dec. 1958).

nounced any basis of claim to territorial sovereignty in the Antarctica."[86]

These illustrations demonstrate that there are very few authors in Russia and Eastern Europe who are dealing in detail with the problem of the legal status of celestial bodies. Therefore, it is very important to note that the official Soviet viewpoint on that issue was stated by two outstanding Soviet scientists the very day a Soviet rocket landed on the Moon. They were Professor Leonid Sedov[87] and the Member of Soviet Academy of Sciences Mr. Topchiyeff.[88] The terms of the two statements were absolutely clear and they offered the assurance that the putting of emblems on the Moon did not represent any territorial claim. This Soviet statement made by two very important persons has never been modified or altered and it therefore represents one of the most important facts on which the further development of the Space Law in this field must be based. The explication which Mr. Kopal gave to this viewpoint seems to us to limit the original statement a bit, but we are happy to note that for the moment we do not find any such modification in any Russian publication.

We have now only to offer some words about the efforts of some collective organizations in the field of the efforts on the theories of legal status of celestial bodies. These efforts are very important, especially at this time and we could not exclude their analysis from our paper. It is quite clear that the most important organization is the United Nations and with an analysis of its efforts in this field we shall finish our modest work. At the beginning of our work we mentioned some international organizations which had the problem of the legal status of celestial bodies on their programs. Let us now proceed to the examination of the works of following international organizations in this respect:

International Institute of Space Law of the International Astronautical Federation
International Law Association
American Bar Association
David Davies Memorial Institute of International Studies
Inter-American Bar Association
Centre d'Etudes du Droit de 'Espace et de l'Astronautique
United Nations Organization

It is obvious that it is quite impossible to quote all the organizations which have dealt incidently with that matter, but those mentioned are the most important among them. Undoubtedly, the organization which dealt most completely with this problem is the International Institute of Space Law of the International Astronautical Federation.[89] Its III Working Group had the following problems on its program.[90]

1. What theories have been advanced by recognized commentators as to sovereignty over celestial bodies?

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[86] Kopal, *Pronikani do vesmiru a mezinarodni pravo*, (Penetration into the Outer Space and International Law), 4 Mezinarodni Politika 242-46, as quoted by Crane, *Guides to the Study of Communist Views on the Legal Problems of Space Exploration and a Bibliography*, Legal Problems of Space Exploration 1011-36, Washington (1961).

[87] Sedov, *Geroizm pokoritelej kosmosa*, Pravda, Jan. 2, 1960, cols. 1-5.

[88] The statement of Mr. Topchiyeff as quoted by Finch, *Territorial Claims to Celestial Bodies*, Legal Problems of Space Exploration 627, Washington (1961).

[89] Smirnoff, *The Role of IAF in the Elaboration of the Norms of Future Space Law*, *supra* note 23, at 147-55.

[90] Report of the III Working Group on the problems of the legal status of celestial bodies, Washington, 1961, p. 2.

2. What should be the legal status of the sun, the moon, the planets, and other natural objects in outer space?

3. Can individual nations obtain sovereignty over celestial bodies?

4. What acts are necessary to establish the sovereignty of a nation over a celestial body? For example, what would be legal effect of contact between: (a) a manned space vehicle and a celestial body; (b) an unmanned space vehicle and a celestial body?

5. What is the extent of sovereignty over a celestial body?

6. How far does the sovereignty in a celestial body extend beyond the physical substance of the body?

7. What theories have been advanced by recognized commentators as to property rights in celestial bodies?[91]

On the basis of that program the III Working Group during 1960-61 with the following membership, Chairman Dr. M. Smirnoff, Vice-Chairman A. A. Cocca, Members: P. Dembling, T. Donner, Escobar Faria, Luiz Gonzaga de Bevilacqua, E. Fasan, Leif Gunnarsen, W. H. Prince of Hannover, C. Vaiscoussis, a Russian delegate still unnamed, K. Kiriloff, B. Nikolajevic, N. Pulantzas, P. B. Yeager, N. Kittrie and Professor Chaumont worked out a Report for the Washington Colloquium on the Law of Outer Space in October, 1961.[92] The report elaborated a Resolution as follows: "The right of occupation and discovery does not exist in the space which is considered as *res communis* and put under the authority of the international organization created in accordance with article 3."

This formula is the same which I offered in the II Colloquium of the Law of Outer Space in London in 1959 and in article 3 of the Draft Convention for Outer Space. A special organization dealing as a Specialized Agency of the United Nations Organization and in close contact with the International Civil Aviation Organization and other appropriate international organizations[93] was foreseen. The Report was discussed at Washington and it was decided that the Group should continue their works on the elaboration of a new Report for the Sofia Colloquium. During the year 1961-62 the Group worked by correspondence and presented a new Report in September, 1962 in Sofia.

The International Law Association has had an item on the Legal Status of Space on its agenda since the Dubrovnik Conference in 1956. The Rapporteur is Professor D. Goedhuis and the ILA promulgated a Resolution during its Hamburg Conference in 1960. The Resolution was as follows:

> 4. "Recommends the conclusion of an international agreement whereby States would agree not to make claims to sovereignty or other exclusive rights over celestial bodies, and affirm the principles of law stated in paragraph 3(a) and (b) of this Resolution."

Paragraphs (a) and (b) were:

(a) Outer space and celestial bodies should be utilized only for peaceful

[91] Prof. J. C. Cooper is preparing some addendums for the different points of that program for Sofia Colloquium in September, 1962.

[92] Report of the Working Group III on the problem of the legal status of celestial bodies, Washington, 1961, p. 26 with a bibliography.

[93] Smirnoff, *The Real Possibilities and the Main Principles of a Future International Convention on Outer Space*, Proceedings of Tokyo Symposium of Outer Space, 1960, p. 317-325.

purposes to the greatest common profit of all mankind in accordance with the principles of the United Nations Charter; and
(b) Outer Space may not be subject to the sovereignty or other exclusive rights of any State.

At the Bruxelles Conference of ILA in 1962 the Outer Space problems are again on the Agenda.

We already said that the American Bar Association sponsored a very interesting work on the Law of Outer Space by Messers. Katzenbach and Lipson. That work is so organized that one can easily find out what different authors wrote about particular problems of Outer Space Law. The American Bar Association continues its work in this field and it would be very useful if a new Index could include all recent works.

A group of British lawyers at the David Davies Memorial Institute of International Studies—Study Group of the Law on Outer Space prepared a Draft Convention on the Space Law. In point 2.1, page 3, they said: "Celestial bodies are not capable of appropriation—they are *res communis omnium.*"

A group of French lawyers at the CEDEA (Centre d'Etudes du Droit de l'Espace et de l'Astronautique) edited a "manifeste de Droit de l'Espace" in 1958 in which we read:

> L'Espace interstellaire et les objets qui l'englobent ne doivent pas faire l'objet d'une appropiation selon les regles traditionnelles de la propriete; ils ne peuvent donc appartenir ni a un Etat souverain quel soit son regime politique ou sa force economique ni a aucune communaute humaine de droit public ou prive et encore moins a ne individualite capitaliste.[94]

The Inter-American Bar Association at its meeting at Bogota, Colombia in February, 1961 adopted the text of the Magna Charta of Space, with the points q) and r) particularly applicable to our subject:

> q) The landing on any other planet containing life, or the occupation thereof, by earthman shall not give to any nation on earth any right of ownership or control of such other planet;
> r) The peoples of the earth do hereby declare that they recognize the rights of sovereignty, ownership and control of any other planet by the inhabitants hereof;[95]

All those organizations are purely private and their work is also purely private. Their task is and has to be of a great importance however, simply because of their independent character. The work of those scientists provides an enormous material and documentation for future intergovernmental efforts in the field of the legal status of celestial bodies. Their work could be compared with the work of Comite International Juridique d'Aviation which was created in 1910 and in following years drafted the Code de l'Air which helped greatly all the works of the intergovernmental conferences on air law.

The intergovernmental initiative on the problem of the legal status of celestial bodies has come from the United Nations Organization. We can safely say that the majority of scholars proposed solutions to the legal problem of celestial bodies by an organization under the auspices of

[94] Bohn, Fondements du droit spatial (avril 1962).
[95] Hyman, *supra* note 79, at 11.

UN.[96] The initiative in the UN itself began on December 13, 1958 when finally after many negotiations an Ad Hoc Committee for the peaceful use of Outer Space was created. The Committee, boycotted by five of its 18 members (USSR, Poland, Czechoslovakia, UAR and India), met on May 6, 1959, and worked in two Sub-Committees. We are especially interested in the works of its Legal Subcommittee under the chairmanship of Professor Antonio Ambrosini. That subcommittee prepared the legal part of the Committee Resolution 1348 in 1959. (June 12, 1959). That Resolution divided all the problems of space law into two groups, high and low priority. The problem of celestial bodies was considered as a low priority problem. In December, 1959, the two big powers USA and USSR succeeded in reaching an agreement on the Membership of the Ad Hoc Committee so that six new members were added to the eighteen existing (Austria, Lebanon, Albania, Bulgaria, Hungary and Rumania). In a Resolution 1472 of December 12, 1959, Part B, an International Conference on the Problems of Outer Space was proposed for 1960 and 1961. In an address to the General Assembly of United Nations President Eisenhower[97] proposed that "celestial bodies are not subject to national appropriation by any claims of sovereignty." For reasons of minor importance the Committee did not meet during 1960 and 1961. It was not until late 1961 that this Committee met and voted a Resolution which became the Resolution of UN General Assembly 1721 dated December 20, 1961. In that Resolution on the proposal of Australia, Canada, Italy and the United States "the application of international law and the Charter of the United Nations was recommended to states for their guidance" in settling problems of Outer Space and celestial bodies.[98] The Resolution also stated that celestial bodies are open for the uses of all states, but for peaceful uses only and that they are not subject to national appropriation.

The Committee met again on March 19 to 29, 1962 and rendered its Report on March 30, 1962, in which it stressed the need for international cooperation in Space. The Report also expressed satisfaction on the exchange of messages between Mr. Nikita Khrushchev and President Kennedy, which started with Mr. Khrushchev's letter of February 25, 1962 following Glenn's flight, and stressed the need of exchange of information and registry of launching objects into orbit, emphasizing the needs of meteorology, telecommunications, etc. It is quite clear that this is a very rapid step forward. After many years of slow progress the year 1962 gave us hopes that the problem of legal solutions to Outer Space especially mentioned in the letters of Mr. Khrushchev and Mr. Kennedy will be nearer to solution.

We are not, however, forgetting the difficulties which may arise in this respect. The direct negotiations between Hugh Dryden and Blagonravov which took place as a result of the exchange of letters between two Presidents will probably produce some concrete results in purely technical matters. In the field of law the solution is not yet so near. The declaration about the application of International Law and UN Charter is a big step

[96] To name only some of them: J. C. Cooper, Andrew Haley, Dr. Pepin, O. Schachter, Eilene Galloway, Smirnoff, etc.

[97] *International Negotiations Regarding the Use of Outer Space, 1957-1960*, Legal Problems of Space Exploration 1009, Washington (1961).

[98] Hyman, *supra* note 79, at 7.

forward but it does not solve the problem because this application in the Outer Space and on Celestial Bodies could be only limitative. Therefore, the big task before the lawyers all over the world is the preparation of the terrain for further direct intergovernmental negotiations. We hope the efforts of those lawyers will be fruitful.

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LEADING ARTICLES

DAMAGE CAUSED BY FOREIGN AIRCRAFT TO THIRD PARTIES*

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I. Introduction

TWO problems are of particular importance in civil air law: the rights of the passenger or consignor and the compensation of persons who did not use an aircraft but nevertheless suffered damage on the surface as a result of the operation of the aircraft. The rights of the user are covered by the Warsaw Convention of 1929 as amended and supplemented by the Hague Protocol of 1955 and the Guadalajara Convention of 1961. Especially the Warsaw Convention offers a fair and adequate solution and has met with world-wide recognition. However, the endeavours to enact a world-wide convention on damage caused to third parties on the surface have failed. The Rome Convention signed October 7, 1952[1] came into force, it is true, on February 4, 1958, but up to now (October 1961) it has been ratified or adhered to by only ten states.[2] The states which stand out in the field of civil aviation have all refrained from putting the convention into force. It appears therefore that the second problem in civil air law remains unsolved.

Nearly ten years after the Rome conference, the time has come to ascertain the fate of that convention and to attempt a prediction. This article undertakes to uncover the reasons why the overwhelming majority of all the states in aviation shrank from this convention. Inevitably linked to this are some considerations on how far one compromise or the other might be developed, thus perhaps promising better reception to a revised convention.

II. The National Laws

Some information on the principles of liability is found in the appendix. It offers only rough statistics, but it evidences the general trend among the states active in aviation. Liability irrespective of fault, the so called "absolute liability" prevails in 41 out of 47 states. This far-reaching right of compensation is unlimited in the majority of the legal systems. The combination of absolute liability in certain kinds of cases and limited liability in other cases—as evolved in the Rome Convention—is to be found only in a minority of states, 15 out of 47.

Legal philosophy is certainly not a matter of statistics or majorities. It should be noted, however, that the United States delegation stood virtually alone in advocating a liability based on fault only. In evaluating their outspoken opposition against the convention, it should be remembered that

* On the Revision or Ratification of the Rome Convention.

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[1] Official text in English, French and Spanish: ICAO Doc. 7379 — LC/34, Montreal, April 1953, Conference on Private International Air Law, Rome, (hereafter Prot.) vol. 2, p. 247; English text: 19 J. Air L. & Com. 447 (1952); French text: 1952 Revue Francaise de Droit Aérien 423 (hereafter RFDA).

[2] For references see column 1 of the appendix.

even inside the United States the law is far from uniform.[3] It is true that liability based on fault exists, but a considerable number of states have adopted the uniform state law for aeronautics without amendment. Section 5 of that law provides for absolute liability.[4]

One substantial shift in the grouping of states may result if the Soviet Union should switch over to a system of limited liability. The Aviation Code promulgated by the Soviet Union on December 29, 1961 contains no provisions relating to our problem (which the Aviation Code of 1935 did). Therefore Article 404 of the Soviet Civil Code dated October 31, 1922 will apply. According to that Code absolute and unlimited liability attaches to all damage caused by dangerous things such as aircraft. The Civil Code, however, is likely to be replaced by a new one in 1963 which will then rule one way or another on aircraft damage caused to third parties. It can be anticipated that many of the Eastern states will follow suit. If that Code adopts unlimited liability it is rather likely that the Soviet zone of Germany, for example, will adopt the same system, while up to now the law has been an absolute but limited liability in accordance with the Rome Convention of 1933 (as is the case in the Federal Republic of Germany). The adoption of the new Rome Convention has been under consideration since 1960 within the Council for Mutual Economic Aid,[5] so that the Eastern countries will probably all ratify or (what seems more likely) all reject the Rome Convention.

The present status of the Rome Convention and the national laws are shown in a simplified manner in the appendix. This survey does not fully explain the apparent failure of the convention for there were four main controversies during the Rome conference—all of which had to be resolved by a majority vote—far from a substantial compromise. The four problems are:[6] (1) The alternative between an absolute liability and a liability for fault only; (2) The limits of liability; (3) National control over foreign security (insurance) for an operator's liability; (4) The single forum in respect of actions for damages. The question before us now is whether or not new arguments or new bases for compromise have appeared after the lapse of ten years.

III. The Controversial Points in the Rome Convention

A. *Absolute Liability*

At Rome there was always the same solid and overwhelming majority of states which wanted the operator to be liable regardless of fault. Only the United States delegation fought and voted for a liability based on a presumption of fault.[7] It was not supported by others.[8] In the years after, official and semi-official statements in the United States denounced the absolute liability provisions of the convention.[9] It cannot be denied, however, that the principle of absolute liability is recognized by most of the

[3] See note, 28 J. Air L. & Com. 315 (1961-62).
[4] *Ibid.*; 2 Prot. 74.
[5] COMECON, founded 1949 to counterbalance the Western OEEC.
[6] Garnault, 1954 RFDA 10.
[7] This seems also the preference of the aviation-insurers, see Wimmer, 1954 Zeitschrift für Luftrecht, 107 (hereafter ZLR).
[8] 1 Prot. 15.
[9] Nunneley, 20 J. Air L. & Com. 89, 91 (1953).

participants in the Rome conference, in the actual national laws and even in a considerable number of states within the United States. And that system appears only fair and adequate, for the "third party" on the surface did not assume any aviation risk. He deserves better protection than the user of an airplane. In order to relieve the operator, one might consider, if anything, allowing him the defence of *force majeure*. More specifically, the representatives of Anglo-Saxon law pleaded in Rome that there should be no liability, if the damage was caused by an outsider, *i.e.*, a person not belonging to the crew. For example, if somebody smuggles an infernal machine aboard an aircraft and as a consequence the aircraft crashes causing damage on the surface, the operator should not be held liable. The same should be the law if a passenger tries to capture the aircraft or otherwise causes damage. The convention of 1933 allowed a defence on that line and provided in Article 2, paragraph 2, subparagraph b, that there should be no compensation:

> in the case of an act unconnected with the management of the aircraft committed intentionally by a person not being a member of the crew, and without the operator, or his servants or agents having been able to prevent it.[10]

The United States, the United Kingdom and Australia tried in vain to have this defence allowed in the convention.[11] It is in this connection that the head of the United States delegation blames the conference for being single-minded to the detriment of the operator.

Acts of outsiders are but a rare and highly unusual instance of causation utterly out of control of the operator. The basic problem is, whether or not the operator shall pay damages even in cases of *force majeure*. The conference discussed that plan several times but rejected it always as being incompatible with the principle of absolute liability.[12] This, however, is not an inevitable conclusion. It all depends on the definition of *force majeure*. Every damage connected with the typical risk of aviation should be justly compensated by the operator by reason of his endangering other people by operating an aircraft. An infernal machine or a hurricane, on the other hand, cannot be counted among the typical risks of aviation. The specific qualities of an aircraft will perhaps increase the damage, but the first and principal cause for the damage is always the criminal attempt or the thunderstorm, neither of which may be attributed to the operator. Therefore it might be considered fair and sensible to let the operator be exempt from liability if he proves *force majeure*, or in common law language, acts of God. The decisive point is to define this defence so that all of the aerodynamical or technical sources of damage would fall on the operator and only the atypical causes, which nobody could foresee or prevent, would relieve him from liability. This principle is already the law in quite a number of national statutes relating to automobile liability. It could be formulated along these lines:

> There shall be no compensation if the damage was caused by an unavoidable event other than a defect of the airplane or a breakdown of its engines or devices. An event is deemed to be unavoidable, especially

[10] Shawcross & Beaumont, Air Law, p. 508, No. 1131 (1951).
[11] de Juglart, La Convention de Rome du 7 Octobre 1952, p. 57 (1955).
[12] 1 Prot. 53, 57, 85.

(a) if caused by the person injured, or by another person not employed in operating the aircraft or by a animal, and
(b) if the operator as well as the pilot have administered all care as demanded by the circumstances.

The burden of proof falls on the operator. Thus, an absolute liability mitigated by the defence of *force majeure* seems justified for reasons of ethics as well as technical development. It might open the way for a compromise even with legal conceptions in the United States.

B. *Damages By Noise*

The convention denies compensation "if the damage results from the mere fact of passage of the aircraft through the air space in conformity with existing air araffic regulations!" This bestows a remarkable privilege on aviation. If the market value of real estate goes down because there is a new air corridor and nobody likes to live underneath it, or if silver foxes are frightened and suffer damages, the operator of the aircraft will in no way be responsible.[13] This rule has met with serious objections but it appears to be in harmony with most of the national legislations. The owner of real property must tolerate airplanes flying over his land and no action in respect of trespass or nuisance may be taken provided the pilot complies with the air traffic regulations, *e.g.*, as to the height above the ground.[14] If the passage is allowed, then the usual and unavoidable noise and interference cannot be objected to either. Our problem begins where unusual or unexpected damage beyond the normal interference occurs. If the owner created the circumstances from which the unusual consequences originated (*e.g.*, by breeding over-sensitive silver foxes) then it is up to him to bear the damages himself. That is at least how some courts have ruled. If, on the other hand, it was the pilot who brought about unusual circumstances (*e.g.*, a sonic boom), then he must pay compensation.

Such is the problem of the Rome Convention. The members of the conference intended, in truth, to deny compensation even for unusual noise, for the British proposal referring to "normal" noise was rejected.[15] In the case of unusual noise it can hardly be said that an eventual damage was caused by "the mere fact of passage of the aircraft." The operator will be liable, therefore, without regard to Article 1, paragraph 1, phrase 2 of the Rome Convention.[16] Indeed, the convention is rather obscure on two points: on unusual noise originating from an otherwise normal passage and on the accumulated noise in the vicinity of airports, especially in the waiting areas near an airport.[17] Since the convention was signed in 1952 new technical standards have developed. It was several years later that the sonic boom turned out to be a potential danger.[18] It could not have been considered in Rome. Damage caused by the sonic boom therefore falls outside the privilege granted in Article 1, and consequently makes the operator liable under the broad principle of the same article.

The convention apparently denies any compensation for damages re-

[13] For details see Rinck, 1954 ZLR 88.
[14] Shawcross & Beaumont, 1951, p. 399 (No. 422), p. 430 (No. 467).
[15] Wilberforce, 1 Prot. 400.
[16] Kistler, *Roemer Haftungsabkommen*, Thesis, Zurich 1959, p. 49.
[17] de Juglart, 1953 Revue Générale de l'Air 353 (hereafter RGA).
[18] Roth, 25 J. Air L. & Com. 68 (1958).

sulting from concentrated noise in the vicinity of an airport. That is the wording and such was the intention of the conference. The United States delegation, however, doubted even this and was afraid that the operator might be overburdened with damage by noise. The United States proposal for laying down rules on the liability of the airport operator would encounter great difficulties since the legal status of airports varies greatly from state to state. Generally speaking, the concise rule on noise, now in Article 1, paragraph 1, phrase 2, is acceptable and indispensable. Nevertheless it should be clarified by interpretation or revision that would take into account or include unusual noise and the sonic boom. All the legal implications connected with noise originating from an airport and its waiting areas could stand outside the realm of the convention and be left to the discretion of the national legislatures.

C. *Limits Of Liability*

Any debate on the justification and merits of limits of liability could be infinite. It is not so much a matter of legal arguments as of legislative discretion. The basic premise could be easily contested by asking whether limits are justifiable at all. The third party on the surface did not assume any risk, nevertheless he may lose his life or his health. Under such circumstances should he be denied full compensation? In international air law the consideration is generally accepted that limited liability is a *quid pro quo* for the absolute liability imposed on the operator. This, however, is not a corollary, as shown by the mere fact that twenty-four states have made absolute liability the law without any limits as to the compensation due. However, the system of limited liability has been recognized in air law conventions since 1929 but will not be discussed here.

The debate over the level of the limits on liability is heated. The United States delegation considered the *per capita* limit on each person injured to be too low, as well as the overall limit,[19] although those limits were approved by other nations and writers.[20] During the conference in Rome two big coalitions—so to speak—had formed. One comprised nearly all the states where big airlines and leading insurers are domiciled. The member-states of this coalition went all out to keep the limits low and especially to fix a rigid ceiling irrespective of the weight of the aircraft. The model for this was Article 8, paragraph 2 of the 1933 Rome Convention. The opposition coalition proved stronger. The first object of all those states which had joined forces was the protection of the victims.[21] The idea of a rigid ceiling was thus rejected. The bigger the aircraft, the higher the overall limit. The maximum compensation provided for each person was limited to 500,000 gold francs as opposed to 200,000 francs in the 1933 convention. The debate over the extent of the limits is not really that important. The statistics show that each year damage to third parties on the surface is very rare and that the risk created by railways, especially at grade level crossings, is several hundred times higher than the risk in aviation.[22] Higher limits could not therefore greatly affect the premiums for insurance against third party risks. There is really no serious objection against levelling up the limits.

[19] Nunneley, *supra* note 9, at 91.
[20] Le Goff, Manuel de Droit Aérien privé 249 (1961).
[21] Garnault, 1953 RFDA 9.
[22] For statistics see Rinck, 1958 ZLR 300.

D. *Forfeiture Of Limits*

More deeply rooted is the antagonism over the forfeiture of limits. Under what circumstances shall the liability of the operator become unlimited, if at all? Article 12, paragraph 1 of the convention provides for an unlimited liability only "if the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage. . . ."

However careless and utterly negligent the person may have been, there should be only limited liability. Even if the pilot foresaw that damage might result and even if he took the risk and just hoped for the best, there could be limited liability only in the case of *dolus eventualis.* The wording of Article 12 creates some difficulty for countries outside the common law tradition. Some of the countries—amongst them Germany—differentiate between intent (French: *intention,* German: *Vorsatz*) and purpose (French: *dessein* or *malveillance,* German: *Absicht*).[23] Intent—as understood in those legal systems—means that the person foresaw the result and approved of it. Purpose on the other hand denotes a stronger psychic engagement. It means that the action was motivated by the desire to create damage. European jurists especially think that only in the latter case of purpose and motivation should there be unlimited liability,[24] and since such a case will hardly ever be proved the liability remains limited even in case of criminal negligence. This is felt to be unjustifiable,[25] but it would be more easily acceptable to a European legal mind if translation and construction make clear that the damage must have been intended but need not have been the object and motive of the operator or his agents. This was the understanding during the Rome conference. The wording was adopted in order to make sure that in all cases of negligence or wilful misconduct, the liability should remain limited,[26] while unlimited in the case of criminal acts.[27]

The main concern of the conference was to avoid the rule of *res ipsa loquitur* as established in common law countries. According to precedents "intent" can be implied in the deliberate and reckless decision of the operator or his pilot. Intent may also be proved by way of presumption created by the fact that the pilot took off in spite of his knowledge that something was wrong with the engine or that some equipment was missing.[28] In these cases, it is true, only limited liability was in the minds of the delegates. Since the rule of *res ipsa loquitur* applies only in civil cases, whereas full proof of intent is required in criminal cases, it is safe to say that within the Rome Convention the law of evidence would be the same as in penal law. Even before common law courts, intent of the operator or his servants and agents must be fully proved.[29] This is what the delegates had in mind.[30] A start in violation of safety regulations or

[23] Schnitzler, Vergleichende Rechtslehre 620 (2d ed. 1961).
[24] de Juglart, *supra* note 10, at 103, 107; Kistler, *supra* note 16, at 60; Rinck, 1954 ZLR 100; 1958 ZLR 304.
[25] Riese, 1952 ZLR 125; Kistler, *supra* note 16, at 60.
[26] Leonel, Brazil, 1 Prot. 76; Friendly, IATA, 1 Prot. 82.
[27] Poulton, Australia, 1 Prot. 79.
[28] Hesse, *The Aircraft Operator's Liability,* Thesis, Institute of Int'l Air Law, Montreal, 1953, p. 119.
[29] *Id.* at 120.
[30] Poulton, Australia, 1 Prot. 80.

with knowledge of some engine trouble gives rise to only limited liability.

This rule is not in harmony with Article 25 of the Warsaw Convention as amended at the Hague. There the passenger gets unlimited indemnification if the damage resulted from an act "done with intent to cause damage or recklessly and with knowledge that damage would probably result." Thus the user receives full compensation on proof of recklessness and knowledge (for which the Roman law term is *luxuria*). On the other hand, the third party, who did not agree to bear any risk, is in a poorer position before the court and has to prove intent of the operator or pilot. It is neither fair nor logical to favour the person who assumed a risk.[31]

A certain consolation may be drawn from the fact that the Rome limits are so high that in most cases the victim is not interested in unlimited liability at all. The principle, however, remains shocking—at least to a European legal mind—and compromise could be easily reached by adopting the Hague formula. The third party deserves at least the same legal position as the user of an aircraft. Unlimited liability should therefore be the law if the damage was caused recklessly and with knowledge that damage was likely to result.

E. *Single Forum*

The problem of jurisdiction was the most controversial issue at Rome. Eventually the majority decided that actions may be brought before the courts of only the contracting state where the damage occurred.[32] This is probably the main reason for the failure of the convention as a whole.[33]

In determining the forum, two interests are clearly opposed to each other. The victims prefer action in their home country and can point to the undeniable advantage that all evidence is most easily obtainable there. The operator, opposed to that, has a natural interest to be sued in his own nation, if at all. It should be considered, however, that he undertook transportation in a foreign country and thus, with respect to those activities, he submitted himself to the jurisdiction of that foreign country.[34] To give a choice of several forums would have the big disadvantage that the observation of the limits could not be relied upon. In different countries judgments might easily be given, the total of which would exceed the limits. How could a court, on the other hand, consider or comply with a judgment pronounced abroad or a claim still before a foreign court, or even future actions?

The conference discussed at length a proposal to permit an additional jurisdiction provided that operator and victim had agreed to it and that both were of the same nationality.[35] This would open the possibility for the parties to conclude an agreement to the disadvantage of, or even in fraud of, other victims. This proposal was therefore rejected by a large majority.[36] Retained was a clause that an agreement as to an additional jurisdiction is allowed if the proceedings cannot have the effect of prejudic-

[31] Garnault, 1 Prot. 85; Rinck, Gefährdungshaftung 29 (1959).
[32] Art. 20, para. 1.
[33] Nunneley, *supra* note 9, at 91, 100.
[34] Toepper, *Comments on Article 20 of the Rome Convention of 1952*, 21 J. Air L. & Com. 420, 422 (1954).
[35] Alten, Norway, 1 Prot. 190.
[36] Poulton, Australia, 1 Prot. 193, 195.

ing in any way the rights of persons who bring action under the original jurisdiction. This proviso makes the agreement practically pointless.[37]

The sole competence of courts in the country where the damage occurred obliges the operators to respond to proceedings abroad and abroad only, for the convention does not apply to damages which occurred in the operator's own country.[38] The consequence is that foreign judgments are to be enforced in the operator's country. It inevitably follows that foreign judgments must be recognized and enforced to some extent. Article 20, paragraphs 4 through 12 establishes comprehensive but complicated rules for that. Foreign judgments must be enforced unless—broadly speaking—one of four excepttions is proved: first, if the defendant was not given a fair opportunity to defend his interests;[39] second, if there was a final and conclusive judgment in respect of the same cause of action;[40] third, if the judgment has been obtained by fraud;[41] fourth, if the foreign judgment is contrary to the *ordre public* of the other state.[42] These rules for the enforcement of foreign judgments and the detailed provisions connected therewith correspond in full with Article 2 of the United Nations sponsored convention on the recognition and enforcement of judgments concerning alimony and maintenance of children, signed at the Hague on April 15, 1958. The international obligation to recognize foreign judgments is still more extensive in the field of transport by rail.[43] National laws as a rule allow the enforcement of foreign judgments under the same provision with the addition that reciprocity be guaranteed. That will always be the case in the states which are parties to the Rome Convention. Thus far the Rome Convention is in line with national and international law. Moreover and generally speaking the recognition of foreign judgments is the modern trend in legal development and favours the unification of law.[44] The rules on the enforcement of foreign judgments can therefore hardly be an obstacle to the ratification of the Rome Convention.

The single forum remains the main obstacle. Searching for a better rule on this point, two solutions are suggested. Besides the forum where the accident happened, another jurisdiction might be recognized in the state where the operator is domiciled. That was the rule in Article 16 of the 1933 convention. The same two forums were recently agreed upon by the ICAO Legal Committee's Subcommittee on Aerial Collisions.[45] The drawback is that judgments pronounced under different jurisdictions may, taken together, exceed the limits. This undeniable disadvantage may be overcome by following a proposal once submitted by the United Kingdom and Italy. Several courts may be competent according to that solution. However, the defendant-operator who alone is interested in the limits, may plead that all the law suits be transferred and concentrated before one court. This plea must be allowed if the operator deposits with

[37] Alten, Norway, 1 Prot. 489.
[38] Art. 23, para. 4.
[39] Art. 20, para. 5, litt. a, b.
[40] *Id.* at litt. c.
[41] *Id.* at litt. d.
[42] Art. 20, para. 7.
[43] Art. 55, para. 1 of the two conventions of transport of persons (CIV) and goods (CIM) by rail, signed at Berne on Feb. 15, 1956.
[44] Smirnoff, 1956 RGA 20.
[45] Art. 14 of the draft. ICAO Doc. LC/SC/Aerial Collisions, No. 71, App. A dated 3/27/61.

the chosen court a security equivalent to the limits. The moment the security is deposited the jurisdiction of all other courts comes to an end. This is rather attractive for the claimants because they are now sure to receive compensation up to the limit—if they win the action—and need not enforce judgments abroad.

This proposal was rejected in a subcommittee for the apparent reason that it is without precedent and perhaps because the subsequent withdrawal of jurisdiction hurts the national prestige of some states.[46] Hardships and unnecessary actions can be avoided by establishing a time limit for the defendant's deposit and plea. Thus the Anglo-Italian suggestion offers the easiest practical compromise between the antagonistic interests of operator and victim. This or a similar compromise means a revision of the Rome Convention and should indeed be considered. As long as the unique jurisdiction remains, countries of Anglo-Saxon legal tradition are unlikely to ratify the convention.[47]

F. *Liability Insurance*

The system of liability becomes worthless the moment the operator turns out to be insolvent. That is why practically all states require the operator to be insured with respect to his liability for damage to third parties.[48] Certain other securities may replace the insurance. This is also the law under Article 15 of the Rome Convention.

Here the last of the great controversies over the Rome Convention arose. This, we are happy to observe, does not involve disputes over legal ethics or philosophy. From the several kinds of securities provided for under Article 15, paragraph 4, the operators generally choose liability insurance and contract with an insurance company in their home country. The policy issued by the insurer must be passed on by all contracting states as adequate security, provided that the insurer was authorized under his national law and, furthermore, that his financial responsibility has been verified by his state of domicile. This verification was highly controversial. Many states, first of all the United States, claimed the right to verify for themselves the solvency of each foreign insurance company.[49] It was but a feeble majority that voted for a weak compromise according to which each state must recognize, for the time being, the verification of the insurer's national authorities. The state overflown may, however, contest the verification and eventually bring the dispute before an arbitrative tribunal or the Council of ICAO. In spite of this contest the state is bound by the foreign verification until the tribunal or the Council gives its opinion.[50] This compromise must be credited to the French delegation.[51] However, to this day the United States has not come around to accepting it and has even questioned the status of the ICAO Council as an arbitration authority.[52] It is submitted that these objections do not carry much weight. If a state enters a bilateral agreement and thus grants commercial rights to another state, it puts some faith in the other state and

[46] de Juglart, *supra* note 10, at 153.
[47] Nunneley, *supra* note 9, at 101.
[48] Le Goff, *supra* note 20, at 239; de Juglart, *supra* note 10, at 112.
[49] de Juglart, *supra* note 10, at 133.
[50] Art. 15, para. 7.
[51] Garnault, 1953 RFDA 12; de Juglart, *supra* note 10, at 137.
[52] Kistler, *supra* note 16, at 79 rejects these objections on good grounds.

in its airlines and the first state may also be expected to extend that faith and confidence to insurance companies in the second country. Passage of foreign aircraft from states which have not signed a bilateral agreement will be rare, so that one need not worry too much about their insurer's solvency.

A new solution might be found by obliging the insurers to join one or the other of the international pools. The insurance pool could then guarantee the company's solvency in favor of the victims. The licensing of such a pool and the control over its conditions of guarantee should be vested in the Council of ICAO. This license would, however, grant a monopoly or something similar. The ICAO Council would have to intervene in the insurance business and keen competition and jealousy would arise amongst insurers and interested pools. This system would therefore suffer from weaknesses as does the present system of foreign verification under Article 15, paragraphs 5 and 7. The obligation to recognize such verification for the time being is hardly sufficient reason to reject the convention as a whole.

The liability insurance brings up another much debated problem, namely the restriction of defences that may be put up against a victim by the insurer. Under certain circumstances the insurer is liable to the victim although he is not liable to the insured operator.[53] Here a problem arises in the case of intentional wrong done by the operator. Under liability insurance the insurer is not bound to indemnify the operator if he caused damage intentionally. That is the national law or is provided for in the conditions of insurance. Under the Rome Convention that defence is denied the insurer in an action brought by the victim. In that respect the convention makes the insurer liable to a larger extent than the national law does.[54] This divergence, considerable as it seems, is of little practical importance. It will rarely be the insured operator himself who causes damage by intent. It will usually be his pilot or another of his servants and agents, and in such a case the insurer must pay even under national law.

The insurer may not avail himself of any grounds of nullity or any right of retroactive cancellation with regard to the policy underwritten. He is liable up to a point even if the damage occurred outside the territorial limits or after the insurance expired. These rules were felt to be acceptable by the insurers with respect to the Brussels Protocol of 1938 as well as to the convention of 1952.[55] Here the United States delegation did not raise objections.[56] Therefore, this carefully balanced system should no longer be questioned. Summing up this chapter it is safe to say that the rules in the convention covering security for the operator's liability seem to present no insurmountable obstacles to ratification and do not need revision.

IV. Summary: Weighing the Interests

Surveying the reasons for the apparent failure of the Rome Convention and leaving minor objections aside, four main weaknesses of the convention evolve:

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[53] Art. 16.
[54] Wimmer, 1954 ZLR 110.
[55] *Id.* at 113, 148.
[56] Nunneley, *supra* note 9, at 100.

Absolute liability, chiefly objected to in the United States. A compromise might be reached by allowing the operator to set up the defence of *force majeure* (not including specific aviation risks).

Damage by noise. Here the convention is not clear. It should be specified that damage caused by a sonic boom must be compensated, while the operator is not liable for noise caused during taking off, landing and waiting above an aerodrome.

Unlimited liability for intentional damages only. Here the opposition comes mainly from European Continental legal thinking. A compromise might easily be reached on the basis of the Hague formula: recklessly and with knowledge that damage was likely to result.

The *single forum* where the damage occurred. This is hard for Anglo-Saxon legal systems to accept. Another jurisdiction might be admitted according to the domicile of the defendant-operator. If the latter deposits a sum with the court covering the limits, then this court alone shall be competent to hear the case.

There are other objections. They could be met by increasing the limits established under Article 11 and by providing that liability insurance be guaranteed by some international insurance pool. These and others are minor objections which really should not prevent ratification or adherence.

Confronted with this convention a legislative body could do one of three things: it could ratify the convention, it could pursue its revision or it could wait and see what other states will do. Weighing the financial interests it is immediately evident that the interests of plain citizens as possible victims are strongly opposed to the interests of the big airlines. The state will protect its citizens best if it does not ratify the convention. Then the legislator may establish absolute or other liability, may put up limits or no limits, and require securities as he thinks adequate. This national law will undoubtedly apply to all foreign aircraft causing damage. The victim can be best protected if the convention is not applied.

The airlines and other operators are interested in ratification. In the large majority of countries absolute liability without limits is the law. A state can protect its airlines from unlimited liability, if at all, only by ratifying the convention. Ratification makes sense only if the big partner-states in aviation also ratify. Up to now they have not. Should the legislator therefore decide to wait and see? Nearly ten years have passed since the convention was signed in 1952. There seems to be no indication of new ratifications in addition to the nine already effected. There is no hope for a sudden change in policy or legal conviction within the big states. Therefore we can see no point in waiting longer than ten years. Two solutions remain before the legislator: to undertake a revision, or to give up hope for a convention at all. Apart from publications in the United States practically all legal writers who ventured to write on this subject have recommended ratification.[57] But there is not much to be said in favor of ratification as long as the other states—and especially the United States—refrain from so doing.

Practical considerations as well as the ideal of unification of law favor the third approach—the revision of the convention. After the frustrated

[57] Garnault, 1954 RFDA 15; de Juglart, *supra* note 10, at 176; Le Goff, *supra* note 20, at 251; Kistler, *supra* note 16, at 107, Legal Committee of the German scientific society for aviation, 1954 ZLR 145.

endeavours of 1933, 1938 and 1952, governments and specialists will be reluctant to take up the same problems again. But some consent has been reached in the meantime and new solutions are outlined above. The time for re-opening the debate might well be chosen now, for the preparatory work for a collisions convention has been advanced.[58] Also that convention makes no sense unless the Rome Convention or a new Rome Convention is ratified at the same time and by the same states as the convention on aerial collisions. Best of all, both conventions could be moulded into one. The gloomy picture given here about the frustration of the Rome Convention is based mainly on papers and books, while the considerations of many states, *e.g.*, of the United Kingdom and the Scandinavian countries, were not published. In order to create a reliable and comprehensive basis on which to make decisions and possibly to initiate revisions, the Council of ICAO should send a questionnaire to all member states (and the USSR). The states should be asked whether or not they intend to ratify the Rome Convention and, if not, to state their reasons for refraining from doing so.

The danger to third parties caused by aviation is too serious a problem and the need for unification of law is too high an ideal for us to resign ourselves to languishing under the doom of the Rome Convention.

V. Appendix

Liability for Damages to Third Parties on the Surface*

Country	*Ratified Convention*		*Liable For*			*Liability*		*Date of Relevant Law*
	1952	*1933*	*No Fault*	*Presumed Fault*	*Proved Fault*	*Unlt'd*	*Limited*	
1. Argentina				X		X		
2. Australia	X		X				X	
3. Austria			X				X	12/2/1957
4. Belgium		X	X				X	9/11/1936
5. Bolivia			X			X		1/10/1939
6. Brazil		X	X				X	6/8/1938
7. Bulgaria			X			X		1948
8. Canada	X				X	X		
9. Ceylon	X		X			X		1950
10. Chile			X			X		10/14/1925
11. Colombia				X ?				5/26/1958
12. Costa Rica			X					1949
13. Czechoslovakia			X			X		9/24/1956
14. Denmark			X			X		5/1/1923
15. Dominican Rep.			X					1/28/1949
16. Ecuador†	X		X ?			X ?		9/12/1936
17. Finland			X			X		5/25/1923
18. France			X			X		11/30/1955
19. Germany			X				X	1/10/1959
20. Guatemala		X	X				X	1949
21. Haiti	X		X				X	3/24/1961
22. Honduras	X		X				X	3/17/1950

[58] ICAO Doc. LC/SC/Aerial Collisions No. 71, dated 3/27/61.

* So far as more recent data were not available, this résumé is based on ICAO Doc. 7379-LC/34, Rome Conference, (April 1953) vol. II p. 63-75.

† Defence of *force majeure* applied to landing and take-off.

Country	Ratified Convention		Liable For			Liability		Date of Relevant Law
	1952	1933	No Fault	Presumed Fault	Proved Fault	Unlt'd	Limited	
23. Hungary			X			X		12/31/1922
24. Iceland			X			X		1929
25. Iraq			X			X		1939
26. Ireland			X			X		1936
27. Italy			X				X	4/21/1942
28. Lebanon			X			X		1/11/1949
29. Luxembourg	X		X				X	
30. Mexico			X				X	12/27/1949
31. Netherlands					X	X		1/15/1958
32. New Zealand			X			X		1948
33. Norway			X			X		6/17/1932
34. Pakistan	X		X				X	
35. Poland				X		X		3/14/1928
36. Rumania		X	X				X	1953
37. Spain	X	X	X				X	7/21/1960
38. Sweden			X			X		6/6/1957
39. Switzerland			X			X		12/21/1948
40. Thailand‡			X			X		1938
41. U. of South A.			X			X		5/21/1923
42. UAR (Egypt)	X		X				X	
43. United Kingdom			X			X		1949
44. United States			X	X		X		
45. Uruguay			X				X	1942
46. U.S.S.R.			X			X		12/29/1961 10/31/1922
47. Venezuela					X	X		6/3/1944
48. Yugoslavia			X ?			X		1949
Total	10	5	42	4	3	29	16	

‡ With reference to damage caused on aerodromes, a rebuttable presumption of fault is applied as against the operator.

THE ROME CONVENTIONS OF 1933 and 1952: DO THEY POINT A MORAL?

By Elizabeth Gaspar Brown†

I. Introduction

A MIDAIR collision between a United Air Lines DC-8 and a Trans World Airlines Super Constellation occurred in the airspace over New York City on December 16, 1960. All the passengers and crew were killed, a total of 128. In addition, 6 residents of Brooklyn died as a result of the collision, and there was extensive surface damage to property including the total destruction of the Pillar of Fire Church. Characterized as "civil aviation's worst disaster,"[1] those on the ground who suffered damage either to their person or property were well situated to secure some redress. They were residents of New York, the state in which the plane collision occurred. The companies which owned the planes were United States companies. Assuming that the airlines refused to make adequate out-of-court settlements, service of process and place of trial would be within the United States. Established and recognized procedures would be employed. A jury trial could be had with the jury free to assess damages. Although New York does not have a statute establishing liability for accidents arising from the operation of aircraft in the absence of fault, in practice it has been impossible for the owner of an aircraft to avoid liability for surface damage from the crash of such aircraft in any state court of the United States.[2]

However, should an aircraft owned by a foreign carrier, KLM (Netherlands) for example, crash in the United States, causing damage to persons and/or property on the surface, problems of recovery for such damage would be multiplied. Ignoring for the moment the probable willingness of the Dutch government to work out some measure of compensation through diplomatic channels, and assuming the injured parties would have to rely on their individual efforts to secure compensation, how would they go about it? In what court could an action be brought? Assuming judgment were secured against KLM in a court located in the United States, how could it be executed? What properties of KLM in the United States could be levied upon? Would some further action in a Dutch court be required? In short, individuals on the surface who suffer

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[1] Aviation Week, vol. 74, Jan. 23, 1961, p. 49. See also Time LXXVI, Dec. 26, 1960, pp. 14-15. The day after the New York disaster, a United States Air Force Convair, carrying seven crewmen and thirteen passengers crashed in downtown Munich, Germany. All aboard the plane and at least 66 Germans on the surface were killed. It is perhaps worth noting that neither of the two crashes came within the scope of either of the Rome Conventions. One was in intra-national air flight and the other involved the crash of a government or state-owned aircraft.

[2] See Rochester Gas & Elec. Corp. v. Dunlop, 148 Misc. 849, 852, 266 N.Y. Supp. 469, 473 (Sup. Ct. 1933) where the court stated: "Such chance as there may be that a properly equipped and well handled aeroplane may still crash . . . shall be borne by him who takes the machine aloft."

injury to their person or property from an aircraft in domestic flight have a reasonable likelihood of securing, either through legal action or through an out-of-court settlement, some degree of redress—especially if the aircraft is owned and operated by an airline. This is not true where aircraft of one country cause surface damage in another.

The question of liability for surface damage caused in international air flight has been an object of concern to European jurists since the early 1920's.[3] The fact that third parties on the ground, injured in the course of international air carriage, had no formal assurance of any redress, caused the League of Nations in 1922[4] to recognize formally the need for international agreement on this, as well as on other matters of private air law.[5]

II. CITEJA

When the Second International Congress of Air Navigation met at London in 1923, it urged that an international conference be called to consider matters of private as distinct from public air law.[6] Such a conference, the First International Conference on Private Air Law, convened at Paris on October 27, 1925. As far as can be determined from available records,[7] the Conference did not consider the possibility of handling private air law problems by uniform domestic legislation. Instead, after identifying a number of the areas not covered by existing international agreements, it urged the creation of a committee of experts to draft appropriate multilateral conventions.[8] This committee held its initial meeting at Paris on May 17, 1926, and took the name of the International Technical Committee of Aerial Legal Experts (CITEJA).[9] The Committee was then divided into four groups, known as Commissions, with specific areas

[3] The first regular international air service was inaugurated on March 22, 1919, between Paris and Brussels.

[4] The Consulting and Technical Commissions of Communications and Transit of the League of Nations recognized this need at their meetings in 1922.

[5] The Convention of Paris, signed on October 13, 1919, was designed to deal with the public law aspects of international carriage by air. It defined the rights of states in the aircraft over their territory, laid down detailed rules relative to the nationality and registration of aircraft as well as providing for their fitness for flight and their flight navigation and landing, and provided a framework for the enactment of administration of international air law on matters falling within the scope of the Convention. For the text of the Convention, see League of Nations Treaty Series, No. 297, I:23.

The Convention of Paris had been intended to have world-wide application. Ultimately thirty-eight states ratified it. It was superseded by the Chicago Convention of 1944, which was signed by fifty-two nations and as of March 1, 1959, ratified by seventy-five. 1958 United States and Canadian Aviation Reports (hereinafter referred to as U.S. & Can. Av. ii-iii.) For the text of this Convention see 61 Stat. 1180 (1945), 1945 U.S. Av. 244.

[6] See Kaftal, La Convention de Rome du 29 Mai 1933 pour l'unification de certaines regles relatives aux dommages causes par les aeronefs aux tiers a la surface et les Legislations Nationales 86 (Paris, 1936).

[7] One of the major problems in this study has been the unavailability of CITEJA documents. Some years ago, it was planned to issue them on microcards, but the project fell through. Hence, it has been necessary to rely on secondary accounts and upon presumably authentic but not official reprints of the documents to a greater degree than desirable.

[8] The antecedents to and the proceedings of this conference appear in Ministere des Affaires Etrangeres, Conference Internationale de Droit Prive Aérien (Paris, 1936). The text of the draft convention appears at pages 85-90. For an account of the work of the conference, see Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air L. & Com. 27 at 30-32 (1932).

[9] For the text of the by-laws of CITEJA, see 3 J. Air L. & Com. 45-46 (1932). See *supra* note 7.

of responsibility allocated to each.[10] Third party surface damage and the liability of aircraft in international flight for such damage, as well as the associated question of insurance, was one of such areas carved out for the Third Commission.

As events developed, the two areas in which CITEJA was primarily concerned and toward which it devoted its major efforts were those of liability toward persons and property carried in international air flight—which culminated in the widely adopted Warsaw Convention of 1929[11]—and those of liability toward third parties from surface damage to persons or property arising in the course of international air flight.

The latter matter became the prime concern of the Third Commission but did not exclude the preparation of draft conventions on at least two other subjects: Assistance to the Salvage of Aircraft and Aerial Collision.[12] The secondary place allotted to these areas may have resulted from a feeling that those travelling by air or sending freight by air did so by a freely exercised choice, while those injured on the surface were injured by forces over which they had no control.

When the Third Commission met for the first time in 1927, the discussions pointed up the fact that in the relatively short period since the invention of a practical heavier-than-air machine, two major legal patterns of liability for surface damage caused by aircraft had developed. While some domestic legislation followed the principle of absolute and unclaimed liability irrespective of fault, this was not uniformly true.[13] These competing philosophies persisted without reconciliation throughout the meetings not only for the Third Commission but also of CITEJA as a whole during 1927, 1928, and 1929.[14] It was not until 1930 that CITEJA finally took cognizance of the fact that unless absolute liability irrespective of fault were coupled with limitation on the monetary amounts of such liability, countries most active in international air carriage would probably reject any convention dealing with such liability. As a result, the principle of limited although absolute liability was reluctantly adopt-

[10] Of the four commissions set up by CITEJA, the Second and Third Commissions dealt with matters of liability. The work of the Second Commission relating to the liability of carriers toward consignors of goods and toward passengers culminated in the Warsaw Convention of 1929.

[11] The Warsaw Convention, formally entitled Convention for the Unification of Certain Rules Relating to International Transportation by Air, was concluded at Warsaw on October 12, 1929, and as of March 1, 1959 had had ratifications and adherences deposited by 97 countries. 1948 U.S. & Can. Av. xii-xiii. For the text see U.S. Treaty Series No. 876. See also 49 Stat. 3000 (1934), 1934 U.S. Av. 239, 245. See also, Drion, Limitation of Liabilities in International Air Law (1954).

[12] See 7 J. Air L. & Com. 609 (1936), 8 *id.* 345 (1937) for drafts of these conventions.

[13] For a table showing the state of the law in twenty-one countries respecting liability for surface damage caused by aircraft, as of 1934, see Kaftal, *The Problem of Liability for Damages Caused by Aircraft on the Surface*, 5 J. Air L. & Com. 179, at 230-231 (1934). See also Knauth, *Air Carriers' Liability in Comparative Law*, 7 Air L. Rev. 259-291 (1936).

[14] At the first meeting of the Third Commission, the reporter, Antonio Ambrosini of Italy, urged absolute liability be imposed on the air carrier. Despite strong support, the Commission did not recommend its adoption. Hence, the conflicting points of view were discussed at the 1928 CITEJA meetings at Madrid. At these Madrid meetings, the cleavage was apparent between countries adhering to the principle of absolute liability, such as France and Switzerland, and those employing a presumption of fault doctrine, such as Great Britain. Although the majority of delegates at Madrid were opposed to any limitation of liability, the Third Commission was told to consider the matter further. See Ide, *supra* note 8, at 34-35. At the 1929 meetings of CITEJA, a decision was again postponed, despite the adoption by the delegates of the principle of absolute liability, for it had become apparent that the incorporation of unlimited and absolute liability into any convention would cause its rejection by the countries most active in international civil aviation.

ed, and incorporated into a proposed draft convention.[15] It was this convention which was submitted to the Third International Conference on Private Air Law, held at Rome in May 1933.

III. The Rome Convention and the Brussels Protocol: 1933-1938

The years between 1925 and 1933 were notable for much effort and little agreement. The laborers to prepare a draft convention dealing with liability for surface damage in international air carriage had been commendable. Preliminary drafts had been prepared with careful attention to phrasing. Discussions had been held by delegates meeting in solemn conclave. But the absence of any real degree of unanimity between the nations was pitifully apparent at the Third International Conference.[16] Unable to resolve their differences, the delegates were forced to choose between agreeing to disagree or agreeing upon provisions characterized by vagueness rather than precision. They chose the latter method.[17]

The 1933 Rome Convention,[18] as finally adopted by the delegates, provided for a system of absolute liability on the part of operators of aircraft in international air flight for damage to third persons on the surface.[19] This absolute liability was coupled with a monetary limit on the amount of compensation which could be recovered in the absence of "gross negligence or wilful misconduct on the part of the operator and his agents."[20] Under these circumstances unlimited delictual liability could arise,[21] including the situation where the operator of the aircraft had failed

[15] A translation of the text of this draft convention appears in 4 J. Air L. & Com. 97-100 (1933). For a comment, see Muller, *The CITEJA and Liability Toward Third Persons on the Surface*, 4 J. Air L. & Com. 235 (1933).

[16] For the position of the United States, see U.S. Dept. of State, Foreign Relations of the United States: 1933, I:940-977 (1950).

[17] Kaftal, *supra* note 6, at 101-102, commented as follows:

> Pour y arriver on a été forcé de sacrifier bien de prescriptions nettes et précises du projet en les remplacant par des textes vagues laissant la faculté à chaque Etat de les interpréter à sa mainère. Bien de questions ont été sciemment omises, d'autres tranchées à la hâte. Il n'est donc guère doutoux que point de vue purement juridique le texte adopté la pa Conférence laisse à désirer.

[18] For the text of the 1933 Rome Convention, see U.S. Dept. of State, Foreign Relations of the United States: 1933, I:968-977 (1950). It might be noted that a telegram of May 27, 1933, for the Secretary of State from John C. Cooper, commenting on the Convention stated in part "Results excellent." *Id.* at 962.

[19] The Convention provided that a right of compensation arose from (1) the existence of damage to persons or property on the surface, (2) caused by the flight of aircraft. See Article 2(1). The damage embraced within the scope of the Convention included (1) that caused by any article falling from the aircraft and/or (2) that caused by any person on board the aircraft. See Article 2(2).

[20] The amount of compensation which could be recovered for damages to persons or property was set out in considerable detail. See Articles 8 and 9. The limit of liability was based on the weight of the aircraft together with the total maximum carrying load. For any one accident, the limit was to be 240 francs per kilogram of weight. The limit of liability of the operator could not be less than 600,000 francs and could not exceed 2,000,000 francs. One-third of the liability was assigned as compensation for injuries caused to goods and two-thirds for injuries caused to persons. A maximum limit on the amount payable to any one person for personal injuries was fixed at 200,000 francs. Provision was made for proportionate reduction where the compensation payable for persons and/or for property injuries exceeded the maximum.

[21] Three situations were set out in which unlimited liability could arise: (1) Where the aircraft was in the unlawful possession of a person, the unlawful possessor was liable without limitation. If the unlawful possession had been acquired because of the operator's failure to take measures necessary to avoid improper use of his aircraft, both the operator and the unlawful possessor were subject to unlimited delictual liability. See Article 5. (2) Where the operator of the aircraft had failed to provide sureties as required by the Convention. See Article 14(b). (3) Where the damage was shown to be caused by gross negligence or wilful misconduct on the part of the operator. See Article 14(a).

to provide sureties required by the Convention.[22] Such sureties or guarantees for assuring payment of compensation adjudged due were also a part of the Convention.[23] Jurisdiction over damage suits was given to judicial authorities of the defendant's domicile and to those of the place where the damage was caused, without, however, prejudicing the injured third party's right of direct action against the insurer where it could be exercised.[24]

While the Convention provisions require a casual relationship between the damage and the flight of the aircraft, it did not define the precise degree of relationship required. It should have been immediately apparent that on this pivotal point the municipal law of all countries would not be in agreement. While this was a source of potential disagreement, there were at least two areas in which the delegates wrangled violently: the principles under which liability would be imposed and the problem of securing payment in the event of injury to third parties. The controversy between the proponents of absolute liability irrespective of fault and those who advocated liability with a presumption of fault, and the related controversy between the proponents of unlimited liability as against those advocating limited liability has already been noted. Despite the attempts to resolve these issues prior to the Conference itself, they were raised again in the course of the meeting. It was obvious that while compromises were effected, no fundamental accord was achieved.

A cleavage developed between those states which had little commercial aviation but whose territory was flown over by the aircraft of other nations and those states which had highly developed international civil aviation and/or had nationals active in insurance and re-insurance activities.

The question of guaranteeing payment of compensation in the event of injury was the subject of heated discussions during the Conference and the provisions finally incorporated into the Convention were subjected to major criticism. Essentially, the problem facing the Conference was to reconcile the interests of three groups of people: injured persons, operators, and insurers. To protect those injured in person or property, prompt payment of compensation adjudged due them was essential. To protect operators and to insure sound financial management, insurance rates needed to be kept at reasonable levels.[25] To enable insurance companies to offer insurance at reasonable rates, restrictive clauses were necessary.

The British delegation made certain proposals which set out a series of defenses available to the insurer.[26] They provoked spirited debates. In

[22] Article 14(b).

[23] Articles 12 and 13. Article 12 provided for alternative means to secure payment of compensation for injuries caused by aircraft in international flight. Either the aircraft could be insured or the domestic legislation of the country of registry could provide for a guarantee against risk in the form of a cash deposit in an authorized depository or a guarantee by an authorized bank. Article 13 provided that evidence of the sureties described in Article 12 be set out "either in an official certificate or by an official notation on one of the ship's papers.

[24] Article 16. The Conference went on record as against the execution of foreign judgments. See Kaftal, *supra* note 6, at 147-148 for sharp criticism of this decision.

[25] The records of the Conference show keen concern for the problems of the "air tourist." By and large problems of the individual private owners of aircraft bulked much larger in the thinking of the delegates to the 1933 Conference than was true at a later date.

[26] Kaftal *supra* note 6, at 120-121. Where a direct action was brought by an injured person

spite of attempts made to reconcile opposing viewpoints, it became clear that the differences were irreconcilable.[27] Rather than imperil the work of the Conference, the delegates decided to exclude from the Convention any regulations relative to restrictive insurance clauses. However, the need for rectifying the omission was recognized, and the Conference expressed the wish for further examination of the question under the direction of CITEJA.[28]

In addition to the actual provisions of the Convention, the delegates were also concerned with the matter of interpretation as influenced by differences in the domestic legislation of the several states. Once again, a compromise was reached between the states which wished to delegate the power of interpretation to CITEJA and those which did not. The Conference finally adopted a resolution proposing that CITEJA study the problem.[29]

The Convention was signed on May 29, 1933, by the delegates of twenty states. Eventually, ratifications were deposited for five.[30] At no time was any wide-spread enthusiasm for the Convention evident, and certain criticisms were labeled. These criticisms serve to illustrate, especially in the absence of a full report of the Conference's proceedings, something of the divergent viewpoints. As a generalization, the British and American objections arose over the insurance provisions[31] and the limita-

against an insurer, the insurer would be limited to the following defenses:

I. Cases of fraud, or deceit regarding a material fact on the part of the insured, whether at the time of receiving the insurance agreement, or in making a claim through this document between the date it would have been completed and the date of the accident which resulted in the claim of the third person;

II. The case where, at the beginning of the flight, the aircraft is not in an airworthy condition or is not properly equipped and supplied in conformity with the regulations applicable to this problem;

III. The case of infringement of any legal rule whatever applicable in the matter, where this infringement has caused the injury or has contributed to it;

IV. The case where the injury is caused when the aircraft takes part in races, or is employed as a trainer for others in pace-making, or makes speed tests, or tries to break records, or is engaged in aerial acrobatic flights or irregular flights, or makes construction and repair tests;

V. The case where the injury is caused during the course of a flight taking place within one hour after sundown and during the hour before sunrise, unless it is otherwise stipulated in the insurance document;

VI. The case where the injury arises from fraud or wilful misconduct by the operator or his employees or agents.

[27] The report of the United States delegation to the 1935 meetings of the Third Commission throws light on the controversy over the insurance provisions. See 1936 U.S. Av. 540-559.

[28] Kaftal, *supra* note 6, at 122.

[29] *Id.* at 129-131. See also II Revue Générale de Droit Aérien 833, 841-842.

[30] Ratifications were deposited for Belgium, Brazil, Guatemala, Roumania, and Spain. 1944 U.S. Av. 90.

[31] Knauth, *Air Carriers' Liability in Comparative Law*, 7 Air L. Rev. 259 at 271-277 (1936) was deeply troubled by the insurance provisions of the convention. He noted that recently enacted British and Irish Free State statutes had attempted to protect third parties against surface damage from aircraft but went on to state that these provisions will suggest the extent to which a well considered "absolute" liability statute must hedge in order to make these crash risks acceptable to the general insurance market at rates which the aviation industry can afford to pay. It is obvious that under this English system, situations will not infrequently arise where the underwriter will escape having to pay for crashes, leaving the victim with only the comfort—which is no better than his present lot—of seeing the aviator put in jail because of his breach of the statute law. The new British and Irish insurance laws thus fall definitely short of the Rome Convention's ideal of an incontestible absolute coverage for the direct benefit of injured third parties. If incontestible insurance cannot be obtained in the great free London insurance market, it would seem quite rash to expect to obtain it in any other market, unless under some government or monopoly scheme.

A comparison of the Rome Convention with the British and Irish Acts of 1936 thus de-

tions on liability. While some United States criticism was directed at the maximum and minimum liability limits placed on the operator and the limitation on the maximum amount recoverable by any one person, the general consensus of opinion was that these provisions did not raise a constitutional barrier to ratification.[32] The objections to the insurance provisions arose in large part from the lack of defenses available to the insurer. It was alleged the lack of defenses made "it impractical, both for the insurer and the carrier" to engage in international air flight. Moreover, "the high degree of risk on the insurer by reason of the uncertainty of the undertaking and the inability to avail himself of defenses would force the rates to prohibitive standards and would consequently discourage commercial enterprises."[33]

The objections to the insurance features of the 1933 Rome Convention were responsible for the preparation by the Third Commission of a draft protocol. Such a draft was submitted to the Fourth International Conference on Private Air Law, held in Brussels, September 19-30, 1938.[34] After certain modifications, it was signed by the representatives of eighteen governments. The Brussels Protocol attempted to provide insurers with certain defenses, specifically that the damage occured after the contract had ceased to take effect but with a grace period provided, that the damage occurred outside the territorial limits imposed by the insurance contract, or that the damage resulted directly from "international armed conflict or . . . civil disturbances."

Whether the Munich Crisis and World War II were responsible for the failure of more nations to ratify the protocol is, of course, uncertain. It is clear, however, that there was no great interest in or enthusiasm for the document.

IV. 1939-1947

It had been expected that the usual annual meetings of CITEJA would be held in 1939, but the international situation caused their cancellation.[35] As a result of World War II, there were no further CITEJA meetings until 1946,[36] when the Fourteenth Session convened at Paris.[37] Another 1946 session was held in Cairo in November where the main question was the relationship of CITEJA to the Provisional International Civil Avia-

monstrates that the Convention has not adequately worked out the methods of providing insurance, although the point was earnestly debated at the Rome meeting. Unfortunately the underwriters were not present at that time, and their practical views were not obtained and developed.

[32] See McCormick, *The Rome Convention—its Constitutionality—its Purpose—its Scope*, 9 Air L. Rev. 207 (1935).

[33] *Torts—Liability of Foreign Carriers While Over American Territory*, 9 Air L. Rev. 281 at 284-285 (1938). See also Edward Sweeney, Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Insurance pp. 401-402 (Washington, D.C., 1941).

[34] The official report of the Brussels Conference is presently unavailable. See Latchford, *Brussels Air Law Conference*, 10 J. Air L. & Com. 147 (1939). See also the reports of United States delegates to the Third Commission meetings in 1936 U.S. Av. 540-574; *id.* 1937: 301-322; *id.* 1938: 221-223.

[35] The First, Second, and Third Commissions met at Paris, January 23 and 24, 1939. See Knauth, *The CITEJA Meeting in Paris in January 1939*, 10 J. Air L. & Com. 167-175 (1939). See also 1939 U.S. Av. 506.

[36] See Latchford, *The Growth of Private International Air Law*, 13 Geo. Wash. L. Rev. 276 at 306-307 (1945); Warner, *PICAO and the Development of Air Law*, 14 J. Air L. & Com. 1-10 (1947); Latchford, *Co-ordination of CITEJA with the New International Civil Aviation Organization*, 12 Dept. of State Bull. 310 (1945).

[37] 1946 U.S. Av. 73-85. See also Subject Index of CITEJA Documents (Montreal, 1952) p. 141.

tion Organization established under the Chicago Convention of 1944.[38] Orderly arrangements were made for the liquidation of CITEJA which held its final meetings in conjunction with the First Assembly of the International Civil Aviation Organization (hereafter referred to as ICAO) at Montreal on May 6, 1947.[39]

V. ICAO and Proposed Revisions of the Rome Convention: 1947-1952

The Legal Committee of ICAO took over the functions of CITEJA.[40] During its first meeting at Brussels in September 1947, it set up a Sub-Committee charged with the revision of the Rome Convention and the Brussels Protocol.[41] At the Sub-Committee's first meeting in 1948, the proposal was made to send out a questionnaire to the several nations to obtain their views on such revision.[42] The proposal was subsequently agreed to by the ICAO Council.[43] The questionnaire set out a number of issues on which there had been a difference of opinion. These included the imposition of absolute liability, the method of insuring the operator's security in the event of surface damage, defenses which should be available to insurers, the forum in which an action should be brought, proportional allocation of responsibility in the event of joint negligence in aerial collision, and whether or not liability should be limited where the operator's misconduct could be shown.[44]

Nineteen states eventually submitted replies to ICAO.[45] Although the Sub-Committee had hoped to prepare the draft of new provisions on the basis of such replies it was unable to do so ". . . because the replies showed that the points of view of the different States were more divergent than had been expected. . . . It would have given an appearance of false unanimity in the Sub-Committee if it had tried to reach a compromise solution for presentation to the Legal Committee. . . ."[46] The replies and

[38] See *CITEJA Meetings at Cairo, November 6-17, 1946*, 14 J. Air L. & Com. 80-82 (1947).

[39] *International Civil Aviation Organization (ICAO)*, 14 J. Air L. & Com. 378-383 (1947).

[40] *International Civil Aviation Organization*, 14 J. Air L. & Com. 378, 382-383 (1947).

[41] Legal Committee, ICAO, First Session, 1947, Minutes and Documents (1948) pp. 224-225, 234-235.

[42] Legal Committee, ICAO, Second Session, 1948, Minutes and Documents (1948) pp. 51, 130-134, 165.

[43] *International Civil Aviation Organization*, 16 J. Air L. & Com. 65, 68 (1949).

[44] For the text of the questionnaire, see Legal Committee, ICAO, Third Session, 1948, Minutes and Documents (1949) pp. 243-247.

[45] Legal Committee, ICAO, Fourth Session, 1949, Minutes and Documents (1949) p. xiv.

[46] *Id.* at 12, 236-241. The report identified five particular problem areas: (1) third party liability, (2) limitation of liability, (3) compulsory insurance or other security, (4) defenses of the insurer, and (5) scope of third party liability. The majority of the states, despite strong opposition from the United States, were opposed to any modification of the rule of absolute liability. While all states were in argeement that the liability of the operator should be limited "with regard to the basis of limitation, the replies differ greatly." The requirement of compulsory insurance raised relatively little disagreement. With respect to defenses available to the insurer, the report stated that

> The replies show that . . . some States are in favour of deleting entirely the defence that the damage occurred outside the territorial limits provided for by the insurance contract. On the other hand the U. S. has proposed that the defence should be available to the insurer regardless of what caused the flight outside those limits. In the opinion of Canada, no provision of insurance should be included in a revision of the Rome Convention. . . . In the opinion of the Sub-Committee the need to protect damaged persons on the surface makes it necessary to restrict the defences of the insurer as far as possible. On the other hand, it must not be overlooked that excessive restrictions may result in making insurance premiums extremely expensive.

the report prepared by the Sub-Committee were discussed at the June 1949 meetings of the Legal Committee. It became obvious that there was little likelihood of reconciliation between the divergent positions expressed by the delegates on such pivotal issues as absolute liability, the degree of and basis for any limitation of liability, compulsory insurance or other security, defenses of the insurer, and scope of third party liability. Perhaps weary with the apparently endless repetition of opposing viewpoints, John Cobb Cooper, representing the International Air Transport Association, and a veteran of the 1933 Rome Conference, warned the Legal Committee that their concern should be with what was the best arrangement which could be worked out to deal with liability for surface damage, not with expressions of "abstract legal theory."[47]

Then days of doctrinaire discussions followed Cooper's speech. Finally, the Legal Committee proposed a second questionnaire, this time confined to the single issue of the limitation of liability. Answers to this second questionnaire were received from twenty-one states, with the divergent views still apparent.[48] A synthesis of the replies was prepared and handed to the delegates from nineteen states and six international organizations when the Fifth Session of the Legal Committee convened at Taormina on January 5, 1950.[49] The delegates met twenty-three times and finally adopted the so-called Taormina draft, which modified in certain respects the 1933 Rome Convention.[50] Although subjected to further changes—at Montreal in June 1950, at Mexico City in January 1951, and at Rome in September 1952—the text of Article 15 in the Taormina draft proved highly alarming to air law experts in the United States.

This article gave sole jurisdiction over all actions arising out of a single accident, occurring in international air flight, to the court at the place where the accident occurred and also provided for execution of a judgment pronounced by such court "in each of the other Contracting States upon presentation of a copy of the judgment authenticated in accordance with the law of the State where the judgment was pronounced" with the further proviso that "The merits of the case may not be reopened." Article 15, however, was not the only provision in the Taormina draft subjected to United States criticism. Article 1, which limited the scope

The scope of third party liability was primarily concerned with the use of the term "arising from contact."

> Some States find the word 'contact' too narrow because the provisions should be applied even in the case of damage caused by the airstream of the propeller, fire or explosion or extraordinary noise, which would hardly be covered by 'contact.' In the opinion of the Sub-Committee it seems desirable to add a clause which would cover damage due to fire or explosion. The Sub-Committee leaves it to the Legal Committee, to decide whether it would be advisable to include damage caused by the airstream of the propeller or extraordinary noise, such kinds of damage being rather unusual and difficult to prove.

[47] *Id.* at 18-19.

[48] *Synthesis of Replies to the Questionnaire on the Limits of Liability in Relation to the Rome Convention*, Legal Committee, ICAO, Fifth Session, 1950, Minutes and Documents (1950) pp. 265-280.

[49] Also available to the delegates was a document entitled *Provisions of National Law Concerning the Liability for Damage to Third Parties on the Surface, Id.* at 281-295. Covering fifty-one states, it synthesized the laws, gave the statutory references, and set out the principles of liability, the exceptions thereto, the limitation of liability, and the persons liable. Examination of this document reveals something of the problems of adjustment and compromise faced by the several delegates.

[50] The text of the Taormina draft may be found at 17 J. Air L. & Com. 194-199 (1950).

of the convention to damage "caused through contact, fire or explosion, by an aircraft in flight or by any person or thing falling therefrom," was criticized on the ground that if the word "contact" meant direct contact with the aircraft or person or thing falling therefrom it was too narrow in scope but that if it meant any "contact" caused however remotely by a chain of events arising from the aircraft or person or thing falling from it it was too broad and also on the ground that there was confusion between notions of absolute liability and proximate cause.[51] There was the usual charge that the maximum limits of liability were too low, and that absolute liability ran contra to accepted principles of tort law.[52]

These charges, however, as well as their predecessors, had never been on strictly constitutional grounds. Article 15 in at least two respects violated United States constitutional principles: it failed to give assurances of notice to the defendants that such an action was to be brought and it provided for execution of foreign judgments by the several states of the United States. This latter was considered the more serious objection on the ground that any ratifying state must give "full faith and credit to the judicial processes of every other State then in being or thereafter created which might become a party to the convention." As a result, the United States would be faced with the question of whether by treaty it could require the several states of the Union to enforce foreign judgments, rendered valid and enforceable in the United States by the treaty, even though such enforcement would be contrary to the laws of the several states.[53]

United States objections to Article 15 were primarily responsible for the changes made by the Legal Committee during the Fourth Session of the ICAO Assembly at Montreal in June 1950.[54] These changes permitted the court, to which application for execution of a foreign judgment was made, to avoid issuance of execution if one of a list of specified circumstances in the pronouncement of the original judgment could be shown.

[51] See Calkins, *Principles and Extent of Liability under the Revision of the Rome Convention Proposed by the ICAO Legal Committee*, 17 J. Air L. & Com. 151 (1950). Calkins was particularly concerned over the provision that based recovery for damages on "contact." He felt that undoubtedly this was not intended to be restricted to direct physical contact with the aircraft itself, but noted

> if the word 'contact' is construed as meaning only that the damage must be caused by the impact of some object, whether connected with the aircraft or not, so long as the impact is in fact brought about by an aircraft in flight, the scope of the Convention becomes far too broad. . . . [T]he Taormina draft substitutes a conventional rule for the common law test of foreseeability. The general rule for determining negligence is that a 'defendant must have acted or failed to act in such a way that an ordinary reasonable man would have realized that certain interests of certain persons were unreasonably subjected to a general but definite class of risk.' The conventional rule, on the other hand, ignores foreseeability and substitutes 'through contact, fire, or explosion.' The net result appears to be that the doctrine of remoteness has no application to damage under the convention and that the aircraft operator will be liable for all harms for which his conduct is the cause in fact. *Id.* at 160-163.

[52] See also Knauth, *Comments on Taormina Revision of the Rome Convention on Damage Done by Foreign Aircraft to Persons and Property on the Surface*, 17 J. Air L. & Com. 200, 201-203 (1950). While the Warsaw Convention set specific monetary limits on the amount recoverable by any one passenger in an aircraft in international air flight—*i.e.*, 125,000 francs or about $8,000—it has been pointed out that a passenger knows he is about to embark in an aircraft in such a flight and is free to take out additional insurance. A person on the ground is not able to foresee the possibility of an air disaster in the same manner.

[53] Cooper, *Recognition of Foreign Judgments Under Article 15 of Proposed Revision of Rome Convention*, 17 J. Air L. & Com. 212-220 (1950).

[54] *Draft Convention of Damage Caused by Aircraft to Third Parties on the Surface as Revised by Legal Commission of Fourth Session ICAO Assembly*, 17 J. Air L. & Com. 328-332 (1950).

During the Seventh Session of the Legal Committee, held at Mexico City in 1951, which prepared the so-called Mexico City draft,[55] these exemptions to execution of a foreign judgment were substantially incorporated into Article 20.[56] At the conclusion of the Mexico City meetings, the chairman of the Legal Committee, E. T. Nunneley (U. S.), submitted a report. It was not encouraging. Nunneley noted that inability of the delegates to reach acceptable compromises forced the selection of particular solutions and pointed out the likelihood "to an important degree" that such selection might well have made the Convention "unacceptable to those holding the opposing view." Moreover, he had

> no reason to suppose that further time or effort in the Legal Committee will substantially reduce the areas of difference or produce acceptable compromise solutions.[57]

He went on to set out the major area of disagreement: (1) the extent of the limits of liability with particular reference to their economic impact on the operators, (2) the security for the operator's liability, and (3) the matter of jurisdiction and execution of judgments.

The Mexico City draft provided that a state overflow by an aircraft is required to accept as satisfactory evidence of adequate insurance coverage a certificate issued by the state of registry of the aircraft showing either that the aircraft is covered by insurance or that provision has been made for alternative methods of security—i.e., cash deposit or guarantee given by a bank.

While the maximum limits of liability imposed on the operators, both for injuries to a single person or his property and for the total amount

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[55] For the text of the Mexico City draft, see 18 J. Air L. & Com. 98-108 (1951). Included in the documents attached to the minutes of the Seventh Session of the Legal Committee at Mexico City is a concordance of provisions appearing in the following international agreements and draft conventions dealing with liability for surface damage; Rome Convention, May 1933; Brussels Protocol, 1938; Professor Iuul's draft, September 1949; Taormina Draft, January 1950; Montreal draft, June 1950; Mexico City drafts, January 1951. Legal Committee, ICAO, Seventh Session, 1951, Minutes and Documents (1951) pp. 379-384. A similar concordance, including the provisions agreed upon at Rome in 1952 appears in the documents attached to the minutes of the Rome Conference. ICAO, Conference on Private International Air Law, Rome, September-October 1952 (1953) II:241-246.

[56] The text of Article 20(6), Mexico City draft of 1951 provided that a court applied to for execution was not required to issue execution if it was satisfied that one of the following situations had occurred:

> (a) the judgment was given by default and that the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;
>
> (b) the defendant was not given a fair and adequate opportunity to defend his interests;
>
> (c) the judgment is in respect of a cause of action which has already, as between the same parties, formed the subject of another judgment which is recognized under the law of that court as final and conclusive;
>
> (d) the judgment has been obtained by fraud of any of the parties;
>
> (e) the right to enforce the judgment is not vested in the person by whom the application for execution is made;
>
> (f) the judgment is one which is contrary to the public policy of the State in which that court is located.

In this connection the comments made on Article 20(6)(f) by Leander I. Shelley, General Counsel of the Airport Operators' Council, in *The Draft Rome Convention from the Standpoint of Residents and Other Persons in this Country*, 19 J. Air L. & Com. 289-299 (1952), are of particular interest. Shelley was concerned that this provision would be used for foreign courts, in countries where airlines were government-owned, to avoid the payment of judgments on no more solid ground than a mere declaration that public policy was contrary to the payment of the judgment.

[57] Legal Committee, ICAO, Seventh Session, 1951, Minutes and Documents (1951) pp. 379-384.

recoverable for a single accident, had been revised upward, no one was satisfied. Some delegates claimed the limits were too high, some too low. Nunneley recommended the collection of statistics, to at least make some facts available. To provide for an orderly presentation of claims arising from a single accident and to allocate compensation for injuries caused within the limits of liability imposed for a single accident, the Mexico City draft included the so-called "single forum" requirement—that is, all claims were to be brought before one court, the court of the place where the damage occurred—on the ground that this was the most equitable solution for everyone. One exception was provided: where all involved were in accord, the courts of another state could be chosen.[58]

As to the security to be offered for the operator's liability, the comment noted two conflicting needs: the right of the state overflown to satisfy itself concerning adequate insurance for over-flying aircraft and the concern by aircraft operators that if the states were given an absolutely free hand to determine how each state was to be so satisfied, the proofs might be so diverse and burdensome as to make international air flight economically unsound. Tentatively, and seemingly without much hope of widespread acceptability, the suggestion was made that the states might agree to accept "a certificate from the *insurer* of an over-flying aircraft that the aircraft is insured according to the Convention, together with a certificate from the *State of domicile of the insurer* as to his status and financial responsibility."

Examining the minutes of the sessions of the Legal Committee of ICAO, it is impossible not to recognize how deeply rooted were the delegates' opinions. The "Synthesis of Comments and Proposals Received From States and International Organizations in Respect of the Montreal Draft Convention on Damage Caused by Aircraft to Third Parties on the Surface,"[59] compiled in 1951, as well as the questionnaires circulated in 1948 and 1949, confirm this. The extent of the difficulties encountered during the preliminary discussions foreshadowed the even greater difficulties largely to arise in the course of the final drafting of an international agreement. The delegates may have struggled patiently with their honest differences, but they lacked the imagination to discard their preconceived ideas and consider whether there might be some alternative means of reaching agreement on a subject all apparently considered important enough to discuss.

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[58] ICAO, Conference on Private International Air Law, Rome, September-October 1952 (1953) II:178-202. See also, a partial reprint in *Comments by ICAO Council on the Liability Limits in Article II of the Mexico City Draft of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,* 19 J. Air L. & Com. 211-218 (1952). Included in this report, under the heading of "Analysis of Claims in Respect of Damage To Third Parties Reported by States," was the following table:

	Aircraft of		
	6000 kg or more	2001 kg to 5999 kg	2000 kg or less
Total number of accidents	14	3	6
Accidents involving personal injury	5	1	3
Accidents involving property damage	13	3	3
Total of claims paid and outstanding in excess of Mexico City limits	2	—	—

It is to be noted that the two accidents where the total of the claims paid and outstanding exceeded the Mexico City draft limits occurred in the United States.

[59] Legal Committee, ICAO, Seventh Session, 1951, Minutes and Documents (1951) pp. 265-295.

VI. The International Conference at Rome: 1952

It was with this background of "deep and apparently irreconcilable divergences of views," together with tentative solutions offered without much hope of acceptance, that the delegates of thirty nations and seven international organizations convened at Rome on September 9, 1952, to consider the drafting of a convention covering liability for third party damage caused in international airflight. Behind them were almost thirty years of international gatherings for this particular purpose. With no major ideological conflict separating the countries into two groups of powers, with a basic interest in securing some degree of protection for injuries to third persons caused in international air flight, this series of meetings had been unable to accomplish more than a ratified but not widely accepted Rome Convention of 1933 and the unratified Brussels Protocol of 1939. Beyond this were a series of draft conventions, the latest of which—the Mexico City draft—lay before the delegates.

Although this last effort was a far more complicated and sophisticated document than the earlier ones, it still did not provide a solution for the same problems which had plagued all the preceding meetings. Conflicting views on liability still existed.[60] The Anglo-American nations inclined toward some linkage between negligence and liability. The other nations stood firmly by their position of absolute liability irrespective of the total absence of fault or negligence. Some progress had been made in setting up limits on sums recoverable under a system of absolute liability, which might possibly be acceptable as a compromise between the desire to protect third parties on the surface and also to protect the aircraft operators' financial well-being. Yet the United States continued to protest that these limits did not give sufficient financial protection to injured parties. While there was agreement that some means had to be provided to insure the operator would be able to fulfill his financial obligations, disagreements persisted as to the means to be adopted.

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[60] According to a *Summary of Systems of Liability in Force in Various States with Respect to Damage Caused by Aircraft*, ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) II:27, the following systems of liability were then in effect:

Absolute Liability

Belgium, Bolivia, Brazil, Bulgaria, Ceylon, Chile, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Guatemala, Honduras, Hungary, Iceland, Iraq, Ireland, Italy, Lebanon, Mexico, New Zealand, Norway, Rumania, Spain, Sweden, Switzerland, Union of South Africa, United Kingdom, *United States, Uruguay, U.S.S.R., Yugoslavia

Fault or Presumption of Fault

Argentina

Presumption of Fault

Poland
*United States

Fault

Canada
*United States
Venezuela

No Indication of System

Colombia

* Some, but not all, states of the United States.

And granted that all these conflicting problems could have been resolved, one of paramount importance still remained—that of the techniques to be employed in enforcing a judgment secured in another nation, a problem rendered doubly difficult because of the Anglo-American concepts relating to the enforceability of foreign judgments. The provision for a single forum—that all actions stemming out of a single incident must be grought in one court—created further complications for Canada and the United States.

The delegates did have available the statistical data accumulated by the Secretary-General of ICAO in 1951 and placed in their hands. Commenting on the incidence of aircraft accidents involving third parties on the surface as revealed by these figures, Wilberforce of the United Kingdom noted:

> . . . for the sake of quite a small matter from an administrative point of view, that is to say, for the sake of perhaps two or three accidents in the course of one year, Governments were invited to set up a very substantial administrative apparatus. . . .[61]

Conscientiously, if unimaginatively, the delegates addressed themselves to the task of preparing a convention. After forty-three sessions a text was produced, based on the Mexico City draft, but incorporating certain changes.[62]

The delegates devoted their attention to three major areas: (1) the imposition of liability with the setting out of limitations thereon, (2) the security to be provided for the operator's liability, and (3) provision for the control of procedure to insure execution of foreign judgments.

Despite objections from the United States, absolute liability of the aircraft operator was retained as a basic principle.[63] The limits of the financial liability imposed under this principle of absolute liability were raised to a maximum of 500,000 francs—$33,000—for each person killed or injured, with other limitations on the total amount of liability which could be incurred by aircraft of different weights in the event of a so-called "catastrophic accident."[64] These limits were in the nature of compromises; as such they were criticized as affording inadequate protection to those injured and at the same time imposing undue burdens on the operators.[65]

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[61] ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) I:29.

[62] For the text of the Rome Convention of 1952, see *id.* II:249-269. See also 19 J. Air L. & Com. 447-461 (1952). For a brief summary of the convention provisions, prepared with an evaluation, see *Summary Analysis of Convention on Damage Caused by Foreign Aircraft to Third Persons on the Surface—Annex to Delegation Report,* 20 J. Air L. & Com. 92-101 (1953). See also Juglart, *La Convention de Rome du 7 Octobre 1952,* 16 (N.S.) Revue Générale de l'Air 335-355 (1953), 17 *id.* 16-23, 143-161 (1954).

[63] For the minutes of some of the pertinent discussion, see ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) I:19-20. In this connection see Drion, Limitation of Liabilities in International Air Law (1954) p. 118.

[64] ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) I:168, Article 11.

[65] Nunneley of the United States had noted:

> The Conference was dealing both with a limit for death and a limit for personal injury. It could therefore happen that a person might survive the injury, but in such a mutilated state, that he was wholly incapable of earning his own living. In those circumstances, to limit the amount per person to 300,000 francs or $20,000 was wholly unwarranted. If this proposal were maintained, the victim who had actually suffered damage to the extent of $50,000, for example, would be denied compensation

Although in most instances the operator's absolute liability was tempered by the financial limitations thereon, the Mexico City draft placed unlimited liability upon the aircraft operator in certain situations, such as wilful misconduct by either the operator or his agents. Objection was raised, both to the imposition of liability under such circumstances and to the definition of the circumstances under which it would arise. Ambrosini of Italy argued for the use of the term "dol" rather than "wilful misconduct."[66] Both these terms were objected to by Goodfellow, representing the International Union of Aviation Insurers, who felt they lacked sufficient precision to protect the operators.[67] Eventually, the final text imposed unlimited liability in the event of "a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage. . . ."[68]

Methods of providing security for the operator's liability had been a problem at Rome in 1933; it was no less of a problem in 1952. The 1933 Convention had set out a system of compulsory insurance with provision for alternative methods—cash deposits or bank guarantees—but contained no provision as to the rights and obligations of insurers. The 1938 Brussels Protocol had fixed the rights of insurers and limited their defenses, but this protocol had never been ratified. Permissive insurance with alternative methods of security was retained in the Mexico City draft, but when the 1952 conference considered this problem again, the United States argued for granting the state overflown the right to satisfy itself on the insurer's financial responsibility. This approach was rejected, and the final draft provided that any contracting state had the power to require that ". . . the operator of an aircraft registered in another Contracting State shall be insured. . . ." Insurance was to be accepted as satisfactory if effected by an insurer authorized to effect insurance under the laws of the state of the aircraft's registry or of the state where the insurer "has his residence or principal place of business." There was a further requirement that the financial responsibility of the insurer be "verified by either of those States." The state overflown was given the further power to "refuse to accept as satisfactory insurance effected by an insurer who is not

above $20,000. In these circumstances, in view of the interest in recovery by the victim, wherever that could be provided without imposing an undue and unwarranted burden on aviation, the Delegates would be well advised to consider carefully whether they wanted to deny the injured person recovery, when that recovery did not exceed the catastrophic limits which the Conference had adopted on the previous day. In his opinion, those limits were low enough; but, to go further and deny recovery to an injured person in circumstances where it was wholly within the ability of the operator to insure his risk and where such insurance would not impose an undue economic burden on him, would be an unwarrantable action by the Conference. *Id.*, I:142.

[66] *Id.*, I:83.

[67] *Id.*, I:87. Goodfellow stated in part:

[I]f aircraft operators were to know where they stood and what liabilities they ought to insure, it was essential to find some wording which would not enable a jury to award unlimited damages on a presumption of intention drawn by them from the facts. So long as a jury was in a position to do this there was always the risk that an operator might be held liable without limit on what was really simple negligence on the part of himself, or even of his servants or agents. He cited the case of an action brought under the Warsaw Convention in which the operator had been held liable without limits because one of his mechanics had committed an error in the adjustment of a sensitive altimeter.

[68] Article 12.

authorized for that purpose in a Contracting State."[69] This last provision was a tacit acknowledgment by the delegates that there was a real possibility certain governments might not accept the convention and that these governments were of the nations where the aviation insurance market was largely centered.[70]

Basically, the solution reached gave each state ultimate control over the acceptance of insurance companies for aircraft flying over its territory. Substantially, the same principle was employed in solving the closely-related problem—verification of the financial responsibility of the insurer and by whom that verification should be made. The delegates were aware that a state might wish to question the financial responsibility, not only of an insurer but also of the guarantor under the alternative means of affording security—i.e., cash deposit, bank guarantee, guarantee by the state of registry coupled with an undertaking not to claim immunity from suit. The problem of effecting this verification, however, proved troublesome. The delegates rejected the French proposal that ICAO be given the responsibility of certifying insurers.[71] The proposal that a certificate of verification of the insurer's financial responsibility be issued by a "state" was recognized as creating problems because of the federal structure of the United States. One United States delegate stated that since the several states in the Union regulated insurance, the authorities in these states would have to issue the required certificates. He wondered if these certificates would be acceptable under the terms of the convention. He stated that probably the only alternative to such acceptance would be for the United States to set up a federal system of regulation and he doubted if this was practical.[72]

The Conference ultimately adopted certain provisions which attempted to satisfy the major United States objections. The final text provided that the phrase "appropriate authority in a State" would be considered to include "the appropriate authority the highest political subdivision thereof which regulates the conduct of business by the insurer."[73] The question of whether or not the person suffering damage should be able to bring a direct action against the guarantor had been raised at Rome in 1933 and at Brussels in 1938. Proposals for the inclusion of such a right had been defeated. However, the Mexico City draft did provide for a limited right of direct action, and this was accepted by the 1952 delegates. It

[69] Article 15.

[70] The minutes of the Conference, *supra* note 64, at 309-313, show an interchange of views illustrated by the following extracts:

> *Mr. Ambrosini* (Italy) was convinced that it was possible to admit that insurance could be taken out with an insurer who was not a national of a State party to the Convention or of a State which was a member of ICAO. What was necessary to render the insurance valid was that it be in conformity with the provisions of the Convention. If it were in conformity with the provisions of the Convention, it should be considered as valid although taken out in any country.
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> * * * * *
>
> *Mr. Cooper* (International Air Transport Associaton) asked if the legal problems which had been raised were more important than the effectiveness of the entire Convention. He agreed that the Convention would be a dead letter if it provided that only insurers domiciled in States parties to the Convention could be used for insurance purposes, particularly if two or three of the States that had been named should not accept the Convention. . . .

[71] *Id.* at 303-305.

[72] *Id.* at 321-322.

[73] Article 15(0).

was restricted to situations where the operator was bankrupt or where there had been a change in operator or where a flight outside the limits of insurance coverage was caused by "*force majeure*, assistance justified by the circumstances, or an error in piloting, operation or navigation."[74] Defenses available to the insurer were specified substantially the same as those provided in the 1938 Brussels Protocol.[75]

The final area of major controversy related to the rules of procedure to be employed and the means to be utilized for the enforcement of foreign judgments. The Mexico City draft, as noted earlier, had provided that actions could be brought only before the courts of the place where the damage occurred except where all persons having claims and all persons from whom payment of compensation was claimed agreed to have the action brought before the courts of another Contracting State.[76] This draft had also provided that the judgments of the single forum must be recognized and enforced in other countries as well as in the country of the single forum. These provisions were ultimately incorporated into the final text of the Rome Convention of 1952, but only after serious objections had been levelled.[77] Sidenbladh of Sweden argued that as a general principle any claimant should have the right to choose the court he preferred. Nadeau of Canada noted the division of powers in Canada between the central and the provincial governments. Since compulsory recognition and execution of judgments fell within the competency of the provincial governments, "his government would be reluctant [to assume] . . . an obligation to enforce the judgments of foreign courts, since this matter was not within its competency." Colclaser of the United States echoed Nadeau of Canada and observed that "she found it disturbing when States which did not have a federal system of government failed to see the difficulties that arose in a federal system of government."[78]

Attempts to reach a compromise were futile. Iuul of Denmark warned that the failure to reach a compromise showed "a most regrettable abandonment" of the heretofore prevailing spirit of conciliation. He pointed out that the only important argument for the single forum was that it would facilitate the maintaining of the limits of liability by preventing a series of courts from handing down a variety of judgments based on the same accident. He pointed out that the single forum provisions would be unacceptable to many states, the very states where "the greater part of international air transport was centralized. We would be foolish to produce an elaborate treaty if it stood no chance of ratification.[79] Booth of Canada

[74] Article 16(5)(a).

[75] Article 16.

[76] Three other solutions, in addition to the single forum with its limited exceptions, were considered and rejected by the delegates. These were (1) multiple forums, with a provision for consolidation of claims in the court of the place where the damage occurred, if the operator elected to deposit a security or establish that he had assets or insurance or other guarantee sufficient to satisfy the claims within the jurisdiction of the court, (2) multiple forums, with similar provision for consolidation if the defendant submits to the jurisdiction of the court of the place where the damage occurred, coupled with compulsory execution of judgments in certain cases, (3) an international tribunal, to constitute *ad hoc* tribunals with jurisdiction to review the decisions of national courts in certain circumstances. See ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) II:49.

[77] *Id.*, I:178-183.

[78] *Ibid.*

[79] *Id.*, I:198.

supported Iuul of Denmark. He remarked that on the single forum provision the delegates had divided 14 to 8 and that:

> The attitude of the majority seemed to indicate a lack of perspective and a willingness to sacrifice the opportunity of achieving a convention that would work, in order to make it a model of theoretical perfection.[80]

The delegates from Italy, France and Mexico answered these Danish and Canadian observations. They were sensitive to the implied criticism of lack of cooperation and obviously resented it. Suphamomgkhon of Thailand then spoke and made it clear he read into the Canadian and Danish comments "a distrust of the courts of the Far East" and that he feared a resurrection of "extraterritoriality."[81]

While proposals to amend the single-forum provisions of Article 20 were rejected, the final draft of this paragraph did contain certain changes from the Mexico City draft.[82] It provided as alternatives to the single forum the right of the parties to submit disputes to arbitration and to take "action before the courts of any other Contracting State" dependent upon "agreement between any one or more claimants and any one or more defendants" with the further proviso that "no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred."

Another paragraph of Article 20, as finally adopted, dealt with the giving of notice to the defendant and other interested parties. It declared that the state "shall take all necessary measures . . ."but it did not contain any clause to make the provision effective.[83] As noted above, the Mexico City draft had listed certain situations in which a court might

[80] *Id.*, I:199. In the course of his remarks, Booth of Canada

> asked the Conference to look for a moment at some of the practical aspects of this problem. The majority, representing less than 25% of the Member States of ICAO and a relatively small proportion of world aviation, had rejected one proposal and was about to reject another of a modest and reasonable character, which was supported by a minority . . . representing States responsible for far in excess of 50% and probably more than two-thirds of the international civil aviation in the world. . . . It must be obvious to everyone that, unless the States that were responsible for the greater portion of the flying in the world found the Convention acceptable, it could never become an effective convention in the interest of international civil aviation.

[81] *Id.*, I:200.

[82] *Id.*, I:481-485, 537.

[83] Toepper, *Comments on Article 20 of The Rome Convention of 1952*, 21 J. Air L. & Com. 420, 424-425 (1954), noted:

> No particultar clause has been provided to make this provision effective. It is up to the Contracting States to see that notice is given to every party in accordance with the national procedural law. There is no doubt that the various national laws in this matter are different and the whole question is far from being well established. One can argue that the mere submission of a state to the Convention by ratification is worthless in this particular respect, unless there is introduced some arrangement for communication between the Contracting States. However, it must not be forgotten that there exists a so-called international standard in these matters for all civilized states; and if there is given, in accordance with this standard, firstly notice of any proceedings and secondly a fair and adequate opportunity for defense, it seems to us that no more need be required. It follows from the wording of Art. 20(2) and (5)(a), that this notification is not to be understood as formal legal notification; the defendant must get factual knowledge of the proceedings. Another point is this: if a state did not provide possibilities for adequate notification and adequate opportunity for defense, this attitude would be against justice and therefore contrary to 'public policy.' Moreover, it could provoke a dispute between the Contracting States themselves on the ground of a violation of the Convention.

refuse to issue execution.[84] Only one situation—that where a court of a state might refuse execution because contrary to the public policy of such state—produced any considerable discussion.[85]

While the areas discussed were those where major controversies appeared in the minutes, there were other, less significant, points of friction. Reading the minutes of the meetings which led up to the 1952 Conference and of the Conference itself, it appears that the delegates of some Western European countries were unable to appreciate the constitutional and procedural problems the Convention provisions posed for the United States and Canada. In addition, they appeared unwilling to comprehend the needs of aviation insurers. Not infrequently, countries representing a great proportion of the commercial aviation interests of the world found themselves an out-voted minority with the opposition arising from countries which were flown over which participated but meagerly in international air transportation. Not that Canada and the United States were conspicuous for their willingness to compromise, but the impression persists that they were prepared to compromise wherever they could within the framework of existing constitutional and legal systems. The United Kingdom and Scandinavian countries appear to have striven honestly to achieve workable compromises wherever possible, but were realistic enough to recognize for the most part that an unworkable or unacceptable compromise is worth little. The comments of the Asian delegates, phrased in flawless English, were irrelevant and showed a failure to understand the rationale behind the several positions expressed.

Representatives of different nations, lacking an overpowering sense of urgency, rarely can overcome divergent viewpoints. This sense of urgency was not present at Rome in 1952. At times the discussions seemed to have little sense of reality and be primarily concerned with theory not substance. Were the delegates unconcerned because of the small number of third-party surface injuries? Did they realize that, while they adhered tenaciously to prepared positions, there was little likelihood of ratification and so no need to compromise? Did they ever question if, assuming the need to deal with this particular international problem, they were pursuing the most practical approach?

Initially fifteen states signed the Convention on October 7, 1952. Ten more eventually signed.[86] As of March 1, 1959, seven states had ratified

[84] Five such situations were listed. The first covered the possibility the judgment might have been given by default and the "defendant did not acquire knowledge of the proceedings in sufficient time to act upon it." The second clause covered another aspect of the same problem—the court was entitled to refuse execution if "the defendant was not given a fair and adequate opportunity to defend his interests." The third situation was where a judgment had already been given in the same cause of action. The fourth was where the judgment had been obtained by fraud. The fifth restricted the right to request execution to the person in whom the claim was vested. The sixth, and final, situation was where a judgment was considered to be "contrary to the public policy of the State in which that court [*i.e.*, the court applied to for execution] is located."

[85] There was considerable argument over the sixth "public policy" exception, with Miss Colclaser of the United States supporting it. See ICAO, Conference on Private International Air Law, Rome, September-October 1952, Minutes and Documents (1953) I:242-244.

[86] The Convention was signed on October 7, 1952, by plenipotentiaries of the following fifteen states:

Argentina	France	Philippines
Belgium	Israel	Portugal
Brazil	Italy	Spain.
Denmark	Liberia	Switzerland
Egypt	Mexico	Thailand

It was signed on October 16 by Luxembourg, on October 17 by the Netherlands, and on November

the Convention which went into effect on February 4, 1958 when five states—Canada, Egypt, Luxembourg, Pakistan, and Spain—had effected ratification.[87] The United States refused to sign the Convention and set out the reasons for the refusal in the *State Department Bulletin*. Six reasons for this refusal were given: (1) the inclusion of the principle of absolute liability, (2) the low limits of total liability provided for any one accident, (3) the limitation of liability for any individual injury of $33,000, (4) the principle of absolute and unlimited liability in the absence of criminal intent, (5) the inability of a nation overflown to satisfy itself of the financial responsibility of the insurer of the overflying aircraft, and (6) the inability of the injured party to have any choice of the forum in which an action must be brought.[88]

VII. Speculations and Suggestions

The United States was not the only nation which had sent delegates to the 1952 conference yet failed to ratify the resulting convention. It was, however, the only nation to spell out officially the reasons for its refusal. Two questions in particular arise out of the listed reasons: (1) was there an insurmountable constitutional obstacle to United States ratification and (2) were the limits of liability actually unacceptable?

On the whole, the constitutional issues posed by the Convention were probably the major deterrent to United States ratification. While the limits of liability were unquestionably low in terms of jury awards in personal injury cases, they were not unreasonably low when looked at from the viewpoint of workmen's compensation. Moreover, the principle of absolute liability, irrespective of fault, had been accepted in certain extra-hazardous occupations and as the basis of workmen's compensation statutes. From the standpoint of United States aircraft operators, it was, of course, possible that the courts of other nations might find wilful negligence and impose unlimited liability, but as a practical matter the fact that the courts of the United States would have to execute the judgment—since the bulk of the aircraft operators' property lay in the United States—would protect the operators.

The liability questions, together with the security requirements for aircraft operators, might have been worked out, absent two other factors: the constitutional question and the relatively low incidence of surface injuries.

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4 by the Dominican Republic. Later signatories included Australia, Canada, Greece, Libya, Norway, Pakistan, Sweden, and the United Kingdom. See ICAO, Conference on Private International Air Law Rome, September-October 1952, Minutes and Documents (1953) I:xxxix; see also 1959 U.S. & Can. Av. xvii.

[87] 1959 U.S. & Can. Av. xvii. Ecuador and Austria deposited their ratifications in 1958.

[88] U.S., Department of State Bulletin (1953) 28:221-222. For a criticism of the State Department's position, see Davis, *Surface Damage by Foreign Aircraft: The United States and the New Rome Convention*, 38 Cornell L.Q. 570-579 (1953). For a discussion of the constitutional aspects posed by the provisions relative to the execution of foreign judgments see Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783-800 (1950). See also, Nussbaum, *Jurisdiction and Foreign Judgments*, 41 Colum. L. Rev. 221-238 (1941); Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It*, 42 Iowa L. Rev. 236 (1957); Nadelmann, *Reprisals Against American Judgments*, 65 Harv. L. Rev. 1184-1191 (1952); Goodrich, Conflict of Laws (2d ed., 1951) pp. 600-642. For an account of the attempt to include provisions in multilateral treaties dealing with the execution of foreign judgments, see Smirnoff, *L'Execution des Jugements des tribunaux etrangers en droit aerien*, 19 (N.S.) Revue Générale de l'Air 17-21 (1959).

The Senate's power to advise and consent to the President's ratification of the 1952 Rome Convention was not in issue. It was, rather, the post-adoption problems aggravated by the then widespread agitation in the United States over the proposed Bricker Amendment. There were too many potential hornets' nests in the convention itself, to render it politically attractive or even innocuous.

Assuming for the moment approval by the Senate of the Convention, this would have immediately raised three distinct though related constitutional issues: (1) the absence of any adequate assurance that defendants would be notified of pending proceedings, (2) the "single forum" requirement which denied a plaintiff domiciled in the United States the right to bring an action in the United States and forced him to bring an action in the courts of the country where the accident occurred, and (3) the provision requiring the courts of one country to enforce judgments rendered by the courts of another.

Over and beyond the possibility that the convention would violate constitutional guarantees of due process, the requirement for the enforcement of foreign judgments ran contra (1) to accepted United States concepts concerning the status of foreign judgments in United States courts and (2) to the dual system of state and federal courts existing in the United States. Had the convention been adopted as a treaty, made the "law of the land," potential constitutional problems of substantial importance would have emerged. It is difficult to visualize how these provisions of the convention could have been reconciled with the American constitutional framework.[89]

Laying aside the constitutional questions, another basic query arises: Is there a need for some kind of international agreement to deal with injuries to third parties arising from international air carriage? Despite the shortage of statistical data,[90] what information is available confirms

[89] Cooper, *Recognition of Foregin Judgments Under Article 15 of Proposed Revision of Rome Convention*, 15 J. Air L. & Com. 212-220 (1950). Although Cooper's comments were directed toward the Taormina draft, they are highly relevant to the text actually adopted at Rome in 1952.

[90] There is a marked shortage of available statistics. One of the best sources of information dealing with passenger fatalities in aircraft accidents of all kinds is Edward C. Sweeney's Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation (1941). Although restricted to 1934-1938, the years immediately preceding World War II, it showed that the safety record of United States air carriers improved dramatically throughout the decade ending in 1938. Comparisons with overseas airlines operations shows that United States aircraft had a substantially and consistently better safety record than did European aircraft. See in particular, *id.* at 27-38, Exhibits 9 through 29.

This same study showed a total of 380 accidents, only 27.1% of which involved some degree of injury to passengers, third parties, or property. Out of the total 380 accidents, 13.68% were accidents which would have fallen within the Rome Convention. *Id.* at Exhibit 7.

This study also shows that out of a total of 141 fatal casualties and 52 property casualties suffered in the period covered, the average fatal casualties had a voluntary settlement of $11,877. Forty-four serious injuries had an average settlement of $8,780. Seventy-five minor injuries had an average settlement of $300. There were three instances of satisfied judgments for plaintiffs, two for fatal claims with an average of $47,825, and one for a serious injury of $30,000. The property casualties showed an average settlement of $229.

The two major sources for post-World War II data, The Aircraft Accident Digest, issued annually by ICAO, and the Resume of United States Civil Air Carrier and General Aviation Aircraft Accidents, issued annually by the Civil Aeronautics Board, are not particularly informative. The ICAO publication sets out the total number of air accidents reported to ICAO. Concerned primarily with passenger fatalities, it does not say how many of the reported air accidents caused surface damage or the extent thereof. The CAB resume does contain one report of some value. Statistics were compiled for the 1946-1959 period showing the number of surface injuries to *persons* resulting from crashes of air carriers (excluding non-carrier aircraft) in the United

the following statement: there was no demonstrable pressing need for such an agreement. Probably the most useful conclusion to be derived from all available sources of information is that the absence of any clear-cut statistics concerning the number and extent of surface damage incidents points up the fact that the problem is not—from the over-all viewpoint—one of serious concern either to administrative agencies or to the airlines. Otherwise more attention would have been devoted to developing more definitive and complete statistics.

Recognizing that the total number of aircraft accidents causing surface damage have been relatively few, what about the rarely-occurring catastrophic accident which is devasting in its impact?[91] Should provision be made to deal with such accident occurring in the course of international air carriage? The available statistics do not make this imperative, though it is possible more refined data would demonstrate such a need. However, assuming *arguendo* that such a need does exist, the pivotal question moves forward: Is a multilateral convention the only way to protect third parties suffering surface injuries?

Recalling the discussions held under CITEJA auspices, it is obvious that almost from the beginning, two opposing viewpoints emerged: a doctrinaire approach by certain European nations and a more pragmatic realistic approach of the Anglo-American countries. The question persists: Had some delegates or nations become so committed to the idea of an international convention in this area that they were unable to consider objectively (1) whether there were sufficient injuries of this kind to warrant special treatment and (2) if the facts indicated a need, was a convention or other form of international agreement the most practical solution. Granted the obvious appeal of a neatly drafted international agreement, such an agreement is worthless if not sufficiently acceptable to secure the ratifications required to bring it into operation.

To many people, the simplest solution to any problem is to "pass a law." The lawyers in civil law countries is much happier when all his answers are set out in a code, and he does not have to handle a plethora of cases. A multilateral treaty which spells out all the details is superficially attractive, but sometimes a less sweeping method of dealing with a problem may produce more realistic and usable results.

To secure assurance of compensation to surface damage victims of international air carriage, three alternative methods to a multilateral convention are submitted for consideration.

Bilateral agreements. If it be conceded nations should make definite arrangements to assure compensation to surface victims of aircraft accidents occurring in international air flight, bilateral agreements offer a relatively simple method. Their use would permit adjustments to handle the admitted problem of differing levels of compensation prevailing in different countries. If the two contracting states had markedly different price levels and standards of living, a range of maximum and minimum payments could be set up, with domestic legislation on the part of the higher-cost-level country making up deficiencies in accordance with a

States. There were 16 such accidents in this period, responsible for a total of 89 injuries to persons, with 32 classed as fatal, 26 as serious, and 31 as minor.

[91] For an informal account of the scene of the New York aircraft collision, four months after it occurred, with some suggestions as to the settlements made by the airlines, see New York Times, April 17, 1961, p. 31.

previously determined plan. The right to fly over another nation could be conditioned on the giving of adequate assurances to the overflown nation that surface damage would be covered up to specified limits, whether that assurance took the form of certification as to the insurer's responsibility or some other device. Procedural safeguards relative to the giving of due notice, providing adequate opportunity to the defendant to protect his interests, defining the courts in which actions would be brought—all these would be easier to work out in terms of only two nations than when twenty or more were trying to achieve similar ends.

Moreover, if such a bilateral agreement were considered as part of a package plan to permit flights of the aircraft of one nation over the territory of another, and *vice versa,* an overall agreement might be worked out containing a number of bilateral agreements. If such a grouping of bilateral agreements were worked out, there would, and should, be differences in the several agreements. Illustratively, country X might have an agreement with country Y and another with country Z, each of which would deal with the same problems but contain somewhat different provisions. Then too, a nation such as the United States which flies its aircraft over countries which do not fly their aircraft over the United States, might prefer a markedly different type of agreement with these states than with, for example, France or Great Britain.

Bilateral agreements would make it possible to take account of the financial status of the airlines of different nations and of their insurers, thus reducing the complexity attendant on certification of the insurer's financial responsibility.

Bilateral agreements would not solve the problem of the execution of foreign judgments, but they might make it somewhat more manageable. However, one major potential, though not unresolvable, difficulty with such bilateral agreements might arise through the lack of coverage as to nationals of countries other than the two contracting parties. For example, an agreement between France and the United States would amply cover individuals in France injured on the ground by a United States aircraft and vice versa. Such an agreement, however, would not cover a Belgian national standing on a French airport or riding along a French highway who was injured from the surface crash of an American aircraft, unless the agreement contained provisions giving such individuals certain causes of action because of their location at the time of the crash.

Domestic legislation. Pending adoption of any type of international agreement, the United States and/or any other interested countries might make legislative provision for individuals injured within their borders by non-domestic aircraft. This provision should be limited to providing certain minimal bases for recovery, analogous to workmen's compensation, but should be sufficient to care for the catastrophic type of air accident where a foreign operator does not have sufficient assets in the United States or carry sufficient insurance to cover such an accident. This device could provide a definite assurance for recovery. If prepared in anticipation of the event itself, it could be drafted carefully, absent the pressure which maimed or killed persons and extensive property destruction can always exert upon legislators. Whatever the bases for recovery, there should be limits upon the total amount recoverable and upon recovery by individuals for injury to their persons or property.

From the point of view of the United States, it might be an advantage to have a uniform system for the recovery of claims for ground-surface injury which would apply alike to United States citizens injured by United States aircraft as well as to United States citizens injured by foreign aircraft.[92] From an internationally oriented viewpoint, this approach has definite limitations, for it does not move in the direction of international cooperation. It would, however, provide minimal standards of recovery for United States nationals and might secure uniform liability domestic legislation for aircraft.[93]

A *"Model Act" or "Model Convention."* Should two or more states achieve even a limited agreement in the area of liability for surface damage, this would have the positive advantage of providing a desirable uniformity or treatment.

If a simple form of international convention could be devised under the sponsorship of ICAO, setting out a system of liability with specified limitations thereon but specifically providing for its implementation by bilateral or multilateral agreements, then countries or groups of countries at their discretion could adopt this basic agreement, with full freedom to implement the convention in one or more of the following ways:

1. Increase the minimum limits of liability.
2. Increase the total maximum which could be recovered in the case of a catastrophic accident.
3. Specify financial guarantees required for flight over another country.
4. Provide that the financing of the catastrophic type of accident was the function of the government. A possible device to achieve this would be to set up a deductible type system whereby the aircraft operators (and their insurers) would be responsible for the non-catastrophic accident and for certain portions of the claims arising out of catastrophic accidents, with the government making up the difference. In some nations, of course, this would simply be a division between two sides of the same pocketbook, for many airlines are government-owned.
5. Set up procedural devices for recovery which would take account of the particular constitutional or policy problems faced by the several nations.

A "model act" convention could provide certain basic minima. The additions, made at the discretion of the several states involved, would provide flexibility and also the opportunity to experiment with a variety of local adjustments. Regional groups of states might emerge. It is at least

[92] If a schedule of payments, with certain specified minimum and maximum payments for personal and property injuries, could be worked out and effected under federal legislation enacted under the Commerce Clause, then United States aircraft might be held responsible for surface damage in a manner comparable to responsibility of the employer imposed under Workmen's Compensation statutes. At the same time, if a United States citizen were injured by a foreign aircraft, he would become entitled to the same payments, financed out of federal funds, with his claim in effect turned over to the United States for collection. It is at least arguable that if the operators of foreign aircraft knew that they would not be subjected to excessive personal injury judgments, they might be more willing to make settlement along prior-established and predictable patterns. Moreover it is unlikely that an established government would not put pressure on the operators of privately owned airlines to make such payments while in the case of a government-owned airline, collection might be facilitated as between governments.

[93] The lack of uniformity in the domestic legislation of the several states of the United States has already been remarked on. On deposit in the Legal Research Building of The University of Michigan is a series of digests dealing with state legislation concerning aircraft and aviation. One of these digests sets out the liability statutory patterns of the several states.

possible that out of such experiences could eventually come a multilateral agreement, but the simpler arrangement might well prove fully satisfactory in practice.

VIII. In Conclusion

Any effort to achieve order from disorder is, in itself, commendable. The recognition in the early 1920's that the growing air transportation industry had an obligation to the innocent person injured on the ground through no fault of his own fostered the adoption of a variety of systems of liability. The belief that aviation was an ultra-hazardous undertaking is understandable, and the imposition of liability without fault during its early years was the logical consequence of such a conviction. Yet viewpoints sometimes survive the situations which caused them to arise, and this may have been the case with the principle of absolute liability, however modified by the imposition of certain financial limitations.

It is always easier to criticize the efforts of the past than to build for the future. When, however, the representatives of sovereign states cannot agree on some means of dealing with a *relatively* noncontroversial problem—whatever disagreement there may have been over the mechanics of solving it—hope for international agreements on a broader scale dealing with essentially controversial problems does not seem bright. For example, if liability for surface damage could not be provided for by international agreement, is there much possibility of providing for liability in the area of peaceful uses of atomic energy, let alone the control of nuclear weapons?

Perhaps in the last analysis, no one in 1952 was honestly concerned with the problem of surface damage in international air flights. Matters seemed to be getting along without a treaty. The several governments may have sent delegates to the Rome Conference with the feeling that if a treaty were drafted in which they could concur conveniently, they would have no objection to signing it, but unless they were prepared to concur in it completely the status quo was acceptable if not ideal. Perhaps the drafters set for themselves too high goals of inclusiveness and uniformity. Or it may be that the allegation of a lack of conciliation and cooperation was valid. Or was it a general apathy toward the whole idea? The relatively sparse comment on the 1952 Rome Convention, the lack of analysis of the failure of the several governments to ratify it, the absence of any pressure for its adoption—these all indicate an apathy not only on the part of the governments but on the part of the governed. There may be need for international agreements or domestic legislation to deal with the subject, or it may be desirable (if not necessary) that there be such agreements or legislation. At least at present there seems little likelihood of the adoption of a conventional multilateral agreement which will secure the adherence of a majority or even a substantial number of the nations.[94]

[94] As this article goes to press in December of 1962, there is evidence of an increased distaste in the United States for any international agreement which limits the liability of aircraft operators. This was brought out in the course of the Fifty-Sixth Annual Meeting of the American Society of International Law in the session held on April 27, 1962, dealing with international aviation policy. Proceedings of the American Society of International Law at its Fifty-Sixth Annual Meeting, 115-134 (1962). The particular questions considered dealt primarily with the limitations of liability under the Warsaw Convention, to which the United States is a signatory—*i.e.*, $8,292—and to the proposed $16,584 under the Hague Protocol to the Warsaw Convention which is still before the Senate Foreign Affairs Committee. The objections to these limitations, as being very low compensation for a man's life or for permanently disabling injuries, are applicable

equally to the dollar limitations under the Rome Convention of 1952, although it should be noted that the $33,000 maximum imposed by the Rome treaty was higher than either the Warsaw Convention or the Hague Protocol. For a discussion of the difficulties encountered by the United States delegation in attempting to raise the limits of liability at the Hague, see Calkins, *Hiking the Limits of Liability at the Hague*, *id.* 120 at 122-125.

Senator Homer Capehart's Administrative Assistant, George Buschmann, informed the session that Senator Capehart had plans to call for a Senate probe to consider whether or not the United States should withdraw from the Warsaw Convention, particularly if the limitation of liability provisions could be separated from the procedural ones. However, the recent defeat of Senator Capehart may prevent such a probe from developing as fully as it might otherwise have done.

Seven months earlier on September 22, 1961, the Aviation Subcommittee of the Commerce Committee of the United States Senate, acting under S. Res. 167, 87th Cong., 1st Sess., had held preliminary hearings on International Air Transportation Problems. It is significant that this hearing, said to be the forerunner of an anticipated staff report, did not mention either the Warsaw or Rome Conventions or the broad question of the limitation of liability in international air transportation. The hearing however, did state that the President's Special Task Force on National Aviation Goals had issued a "comprehensive report, dealing in large part, with the particular problems and issues in U. S. International Aviation Policy. . . ." Hearings Before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess., at 59. However, the Monthly Index to Government Publications, 1961, contains no reference to such "comprehensive report."

INTERNATIONAL REVIEW†

I. INTERNATIONAL CIVIL AVIATION ORGANIZATION

REPORT OF THE LEGAL COMMISSION

I. Introduction

1. Between 23 August 1962 and 8 September 1962, both dates inclusive, the Legal Commission held seven meetings over which the undersigned had the honour to preside.

2. During its second meeting, the Commission elected Mr. B. S. Gidwani (India) as Vice-Chairman.

3. A summary of the discussions will be found in the minutes of the meetings.

4. The delegates of nearly every Contracting State attended all or some of the meetings of the Commission.

5. Observers from the Intergovernmental Maritime Consultative Organization, the International Air Transport Association, the International Chamber of Commerce, the International Law Association and the International Union of Aviation Insurers attended the meetings.

6. The Secretariat of the Commission was composed of Messrs. P. K. Roy, G. F. FitzGerald, G. Bonilla, R. Mankiewicz and R. Lemaître.

II. Consideration of agenda items referred by the Assembly to the Legal Commission

General review of the legal work of the Organization

7. The Commission noted the information paper presented by the Council which reviewed the legal work of the Organization.

Programme of future work of the Organization in the legal field

Work programme of the Legal Bureau

8. The Commission noted the information set forth in paragraphs 1 and 1.1 (Work programme of the Legal Bureau) of the paper presented by the Council concerning the future work of the Organization in the legal field (1963-1965).

Work programme of the Legal Committee

9. The Commission, having noted the information set forth, undertook a general examination of the subjects in the Work Programme of the Legal Committee prior to the Fourteenth Session of the Assembly.

10. These subjects were as follows, arranged according to the degree of urgency, into categories A and B:

Part A:

Subjects on the current programme:

Legal status of the aircraft

Aerial collisions

Carriage of nuclear material by air

Legal status of the aircraft commander

Liability of air traffic control agencies.

Part B:

Subjects on the non-current work programme:

† Compiled by Julian Gazdik in co-operation with ICAO Officials G. F. Fitzgerald (on legal matters), A. M. Lester (on economic/statistical matters) and Mrs. M. A. Dowling.

Study of a system of guarantees for the payment of compensation in pursuance of the Warsaw Convention

Study with a view to unifying the rules relating to procedure in cases arising under conventions on air law and of the rules of procedure applicable to the execution of judgments

Research in regard to measures for promoting the uniform interpretation of international private air law conventions, and research in regard to measures to be taken in order to ensure (a) the international authority of judgments by competent tribunals on conventions in force on air matters and (b) the distribution and allocation of awards in pursuance of such conventions

Consideration of problems concerning assistance on sea and land and remuneration therefor

Problems of nationality and registration of aircraft operated by international agencies.

11. The Commission's attention was drawn to the following subjects which were not included in the Work Programme mentioned in paragraph 10:

(i) Legal problems affecting the regulation and enforcement of air safety which have been experienced by certain States when an aircraft registered in one State is operated by an operator belonging to another State. (Resolution B of the Guadalajara Conference.)

(ii) New problems of private air law arising in connection with hire, charter and interchange of aircraft, particularly in relation to the liability of a person who makes available to another an aircraft without crew. (Resolution D of the Guadalajara Conference.)

12. Having made an examination of the items mentioned in paragraphs 10 and 11, the Commission undertook to draw up a Work Programme, taking into account developments relating to these subjects, their importance and urgency.

13. The Commission drew up a programme dividing the subjects retained for study by the Legal Committee into two categories:

A. Subjects on the Work Programme on which work should be done at present.

B. Subjects on the Work Programme on which no work should be undertaken or directed by the Legal Committee, unless and until a report had been submitted to the Council by the Secretary General or by the Chairman of the Legal Committee indicating the need for such work and Council had approved, or unless the Assembly or Council otherwise directed that active work should be undertaken.

14. The Commision decided to include, in Part A of the Legal Committee's General Work Programme, the following subjects in the order of priority appearing hereunder:

1. Legal status of the aircraft;
2. Resolution B of the Guadalajara Conference:
   Legal problems affecting the regulation and enforcement of air safety which have been experienced by certain States when an aircraft registered in one State is operated by an operator belonging to another State.
3. Aerial collisions;
4. Liability of air traffic control agencies:
   Despite the place of this subject on the list, the Legal Commission recommended that the Legal Committee should study the subject through a subcommittee prior to the next meeting of the full Committee.

In addition, the following subjects were included in Part A of the Work Programme:

Liability in respect of nuclear material in relation to civil aviation: This subject was not assigned any specific rank in Part A; but the Commission noted that early action was desirable, particularly in regard to ensuring proper representation of ICAO at meetings which are soon to be convened by the International Atomic Energy Agency in respect of civil liability for nuclear damage.

Problems of nationality and registration of aircraft operated by international agencies: This subject was not assigned any specific rank in Part A but the Legal Commission desired it to be recorded that, if the Council received a request concerning the legal aspects of this subject, it should transmit the request to the Chairman of the Legal Committee who should appoint a subcommittee to study the matter and report thereon to the Legal Committee.

14.1 The Commission also recommended that the subject "Legal status of the aircraft commander" be moved from Part A to Part B when the Legal Committee had finished its work on the draft convention on offences and other acts occurring on board aircraft.

15. The Commission decided to recommend for retention in Part B of the Work Programme of the Legal Committee the items listed under the heading "Part B" in paragraph 10 above, save for the last item[1] which the Commission recommended for transfer to Part A. (See para. 14 above.)

15.1 In addition, the Commission decided to include in Part B of the Work Programme of the Legal Committee the subject "Resolution D of the Guadalajara Conference" which was concerned with new problems of private air law arising in connection with hire, charter and interchange of aircraft, particularly in relation to the liability of a person who makes available to another an aircraft without crew.

Status of International Conventions on Air Law (Resolution A12-23)

16. The Commission considered the status of international conventions on air law which had been adopted under the auspices of ICAO.

16.1 It noted that, since the Twelfth Session of the Assembly, progress had been made in the ratification of the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948) and was of the opinion that it was not necessary for the Commission to recommend any further action by the Assembly as to this Convention at this time.

16.2 The Commission had before it a number of proposals concerning action that might be taken in relation to securing wider acceptance of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952). Some States were of the view that the Convention should be examined by the Legal Committee to see if possible amendments could be developed which might make the Convention acceptable to a greater number of States. Other States felt that perhaps this could best be done by the Council and Secretariat. Still others felt that no attempt to change the Convention should be made and that the Assembly should again request all States to ratify or adhere to the Convention as soon as possible. No one of these possible courses of action obtained a majority within the Commission and none was adopted.

16.3 The Commission recommends for adoption by the Assembly the draft Resolution set forth in Appendix A hereto concerning ratification of the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague, 1955).

Proposed Repertory of Practice of the Assembly, the Council and other organs in relation to the Convention on International Civil Aviation

[1] Problems of nationality and registration of aircraft operated by international agencies.

17. The Commission noted the information presented by the Council in relation to the preparation of the proposed repertory of practice.

R. P. Boyle, Chairman

APPENDIX

Draft Resolution A14-

Participation of States in International Conventions on Air Law—Protocol to Amend the Warsaw Convention

THE ASSEMBLY

CONSIDERING that with the entry into force of the Warsaw Convention as amended at The Hague in 1955, the unamended Warsaw Convention will not cease to be binding on certain States, and

CONSIDERING that after the entry into force of the said amended Convention, the responsibility of the air carrier might be subject to differing international regimes,

EXPRESSES the hope that the States concerned will, as soon as possible, ratify or adhere to the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929.

II. INTERNATIONAL AIR TRANSPORT ASSOCIATION

Introduction

1. Since the last AGM the Legal Committee has met only once, from 1st to 4th of May, 1962, in the premises of the New York University Law School, New York.

2. During this meeting, we reviewed the present status of ratification of the Rome and Warsaw Conventions and the Hague Protocol. We examined the recently drawn up Guadalajara Convention, and we also studied the Draft Conventions dealing with Offences Committed on Board Aircraft, and Aerial Collisions, which are presently under consideration by the ICAO Legal Committee. We also scrutinized the draft convention on Civil Liability for Nuclear Damage which is being developed by the International Atomic Energy Agency.

3. Additionally, we discussed the possibility of adopting a Standard Liability Clause in Ground Handling Agreements; and we examined the proposed amendments to Traffic Conference resolutions for regulating Interline Agreements with non-IATA carriers. At the request of the Medical Committee, we also examined a document entitled "Fitness for Air Travel—Medical Information".

4. In conjunction with our New York meeting, we met the Special Committee on the Conditions of Carriage, in order to formulate future plans for bringing about as much uniformity as possible in the Conditions of Carriage used by IATA Members.

5. All these matters are more fully dealt with hereafter.

Rome Convention

6. We reported last year that the ratification by States of the Rome Convention of 1952 had been very slow and that certain countries had shown little or no interest in ratification. To date only 11 States have ratified or adhered to the Convention. Some 14 others have indicated that ratification has been considered but has been delayed owing to administrative difficulties.

7. We noted, however, with disappointment, that many important States

had advised ICAO that for various reasons they found the Convention unacceptable and had no present intention to ratify it.

8. Under these circumstances we fear that the desired degree of uniformity in the rules governing liability for damage caused to Third Parties on the Surface, which would be very important in the event of a major catastrophy, would not be achieved.

9. Whilst IATA is on record as supporting the Rome Convention of 1952 and still hopes that States will make every effort to ratify it, we envisage the possibility that ICAO may, under the circumstances, decide to re-examine the rules embodied in the Rome Convention. It is our recommendation that, should ICAO undertake such a study, IATA should co-operate in order to assist in developing a revised Convention which would be more acceptable to all concerned.

Warsaw Convention and Hague Protocol

10. We noted that the Warsaw Convention has recently gained three further adherents, namely Mali, Guinea and the Korean Popular Democratic Republic, and that some 23 States have so far ratified the Hague Protocol, which will become effective upon ratification by 30 States.

11. We were also fully informed by U.S. Members regarding the review of the Warsaw Convention and the Hague Protocol which is now under way in the United States. We are very much interested in the results of this review, which can have a profound effect upon international air transport, and will continue to follow developments closely.

Guadalajara Convention

12. Your Committee reported last year that a Diplomatic Conference, held in Guadalajara during August-September, 1961, had drawn up a Convention, supplementary to the Warsaw Convention, the purpose of which is to regulate international carriage by air performed by a person who is not a party to the contract of carriage. The new Convention expressly extends the standard rules of the Warsaw Convention and its limitation of liability provisions to any carrier who, with the authority of the carrier who entered into the contract of carriage with a passenger/shipper, carries the passenger/shipment over the whole or part of a journey which is governed by the Warsaw Convention.

13. The new Convention does not purport to deal with all aspects of Hire, Charter and Interchange, but it does contain valuable clarification of certain ambiguities inherent in the Warsaw Convention as regards international carriage performed by a person who is not a party to the contract of carriage. Accordingly, wide acceptance of the new Convention would be to the advantage of carriers, and we recommend that IATA take such action as lies within its powers to induce Governments to ratify the Guadalajara Convention.

Offences and Certain Other Acts Occurring on Board Aircraft

14. This important subejct will be the main item on the agenda of the Fourteenth Session of the ICAO Legal Committee, scheduled to be held in Rome during the coming fall.

15. The draft Convention on Offences and Certain Other Acts Occurring on Board Aircraft embodies principles of importance in the day-to-day operations of commercial air carriers and, therefore, merits careful consideration.

16. We had before us the report of the ICAO Legal Sub-Committee which, in the spring of 1962, in Montreal, reviewed the comments made by States and international organizations on a previous "Munich Draft" and considered certain new proposals relating to hi-jacking (unlawful seizure) of aircraft and the problem of chartered aircraft.

17. While we believe that the recommendations of the ICAO Legal Sub-Committee would generally improve the "Munich Draft", we have objections to

certain features of the proposals, with the details of which it is not necessary to burden this Report. Our criticisms will be conveyed in detail to the proper quarters. For present purposes it is sufficient to say that our main difficulties relate to the following:

(a) We are opposed to any extension of the rights which States now have, under the Chicago Convention, to compel aircraft flying over their territory to land. It seems to us that by implication, at least, Article 3 of the Sub-Committee's text would bring about such extension for the purpose of enabling a State to apprehend a person on board an aircraft who has committed, within its airspace, an offence of a specified nature.

(b) We consider unsatisfactory any provisions which would require an aircraft commander, in exercising the powers (which the Convention grants him) to take steps for the preservation of the safety of his aircraft or its load, or for the maintenance of good order and discipline on board, to decide what may turn out to be difficult legal questions or to draw fine legal distinctions. Such requirements seem to us to be necessarily involved in Articles 5, 6 and 7 of the draft.

18. The ICAO Sub-Committee, in its report, also drew attention to the problems that may arise under the proposed Convention when an aircraft registered in one State is chartered to an operator domiciled in another State. We believe that these problems will have to be faced and that the proposed Convention, if it is to be fully effective, will have to provide a solution to them.

19. The report also mentions a suggestion by the United States to include in the draft Convention provisions dealing with the hi-jacking (unlawful seizure) of aircraft. We are not quite convinced that much can be gained by attempting to deal with this problem in an international convention. However, as IATA will have full opportunity to express its views at a later date, after ICAO has further examined the subject, we did not consider it necessary to take up a final position now.

20. Before leaving the draft Convention, we must make mention of two related matters. The first of these, which had been referred to us by the Technical Director of IATA, concerned the "Carriage of Abnormal Passengers" and arose out of an IATA carrier's unfortunate experiences with an intoxicated and disorderly passenger. We are satisfied that the draft Convention confers ample powers on an aircraft commander to cope with a situation such as that with which the carrier was confronted. In regard to the airline's further suggestion that the supply of intoxicating beverages to passengers should be limited "by law or convention" our attitude is that this is a matter for carriers' own domestic regulations and/or conditions of carriage.

21. The second matter concerned the Arming of Crews. This involved an examination of the extent to which States are entitled, under Article 35 of the Chicago Convention, to prohibit the carriage of ordinary sidearms by persons on board foreign registered aircraft. Certain States do in fact impose such a prohibition with respect to aircraft flying over their territory, unless the prior consent of the appropriate national authority has been obtained.

22. It is not for us to decide upon the necessity or advisability of crew members carrying side-arms. Should IATA decide to intervene on behalf of the Members, we consider that the best way to set about it would be to persuade ICAO to:

(a) recommend to States, in terms of Article 35(a) of the Chicago Convention, that side-arms carried by crew members are not to be treated as "munitions of war or implements of war" for the purposes of that paragraph;

(b) urge States not to prohibit the carrying of such arms by crew members pursuant to any regulatory powers that may be derived from Article 35(b).

23. Alternatively it might be possible to achieve this objective by urging the ICAO Legal Committee to incorporate appropriate provisions in the draft Convention dealing with Offences and Certain Other Acts Occurring on Board Aircraft.

Aerial Collisions and Liability of Air Traffic Control Agencies

24. The agenda of the ICAO Legal Committee also includes the subject of a draft Convention on Aerial Collisions, which subject, in our view, is closely bound up with that of the liability of Air Traffic Control Agencies. Our Sub-Committee, under the Chairmanship of Mr. Lionel Cooper, brought up a very useful interim report regarding the liability of agencies providing Air Traffic Control Services. After consideration of this report, the Committee decided that the Sub-Committee should continue with its work and that, in order to provide it with more material on which to base a comparative study, the members of the Committee should individually prepare, for the guidance of the Sub-Committee, memoranda on the legal position in their respective countries as affecting the liability of such Agencies.

25. Until our own investigations have been further advanced, we do not feel justified in formulating a conclusive recommendation on the necessity for bringing the liability of Air Traffic Services within the ambit of the Aerial Collisions Convention.

26. For the time being, however, we wish to reiterate our previous position that it is important to achieve uniform rules governing Aerial Collisions, and that the proposed Convention would be greatly improved if it contained clarification of the liability of Air Traffic Control Agencies. We noted with satisfaction that ICAO has inaugurated a special study of the liability of such Agencies, and we welcome this as an important step in the right direction. We recommend that ICAO be urged to proceed with this study con-currently with the further development of the Aerial Collisions Convention.

Convention on Civil Liability for Nuclear Damage

27. A Diplomatic Conference is planned for early 1963 in Buenos Aires for the purpose of finalizing the Draft Convention on Civil Liability for Nuclear Damage which has been developed under the auspices of the International Atomic Energy Agency. This proposed worldwide Convention, to which we referred in our Report last year, seeks to establish uniform rules governing the liability of the operators of nuclear installations.

28. We found the principles embodied in the draft to be generally satisfactory from the carriers' point of view. Our main concern at this time was with the recourse action that may be allowed to such operator against an air carrier where damage has resulted from a consignment of nuclear materials in transit. In our opinion IATA should express a very decided preference for Alternative A of Art. VII in accordance with which such recourse action would, apart from the case where it is expressly provided for by contract, be limited to acts or omissions done with intent to cause damage, and would in any event lie only against the individual who acted or omitted to act with such intent.

29. A Convention dealing with the same subject having been finalized last year by the European Nuclear Energy Agency of the Organization for European Economic Co-Operation (OEEC), we consider it important, in order to avoid confusion, that the rules embodied in the proposed world-wide Convention should not be inconsistent with those of the already existing European Convention.

30. Since it is important to guard against the inclusion, in this draft Convention, of provisions that may prove prejudicial to air carriers, we hope that it will be possible for an IATA Observer to attend the Diplomatic Convention referred to in para. 27 above.

Standard Liability Clause in Ground Handling Agreements

31. You may recall that for the last year or two your Committee has had under consideration the possibility of drawing up a Standard Liability Clause for incorporation in Ground Handling Agreements.

32. We must now report that our efforts have proved unavailing. The draft liability clause which we had prepared was submitted to the IATA Insurance Sub-Committee and the Ground Handling Advisory Group for comment. From the comments of members of these groups, it has become clear to us, first, that there are considerable divergencies in the liability clauses at present in use and, second, that airlines for various reasons are reluctant to abandon their present systems. We have, therefore, concluded that, for the present at any rate, the attainment of uniformity in this area is not practicable.

Interline Agreements With Non-IATA Carriers

33. During the year we were advised that the Traffic Conferences planned to consider amendments to certain IATA resolutions regulating interline relationships between IATA Members and non-IATA carriers. We fully appreciate the desirability of finding a solution to this problem and have communicated our observations regarding the suggested draft Traffic Conferences resolutions to the Traffic Director.

Interline Medical Certificates

34. We were asked to examine a form entitled "Fitness for Air Travel—Medical Information", which was drawn up by the Medical Committee of IATA.

35. This form is intended to provide confidential information to enable the airlines' Medical Officers to assess the fitness of an intending passenger to travel.

36. From the legal point of view, we find no objection to the contents of this form and have so advised the Medical Committee.

Conditions of Carriage

37. At the joint meeting with the Special Committee on the Conditions of Carriage, under the Chairmanship of Professor John C. Cooper, we reviewed the present situation. By Conference resolution there has been established a set of Uniform Conditions of Contract for the passenger ticket and a set of Uniform Conditions of Contract on the airwaybill but there are no Uniform Conditions of Carriage forming the subject either of a mandatory resolution or of a recommended practice.

38. It will be recalled that in 1953, in Honolulu, the Traffic Conferences did adopt a set of Uniform Conditions of Carriage against which, however, considerable objections were raised by certain States. Having regard to these objections, the Traffic Conferences considered it advisable to delete the relevant resolutions.

39. Since then, divergencies have crept in in the Conditions of Carriage, tariffs, rules and regulations of individual airlines and if this tendency continues it may become icreasingly difficult to obtain uniformity. Further, many carriers have not brought their existing General Conditions of Carriage into line with the mandatory IATA Conditions of Contract on the ticket and airwaybill and this has resulted in certain inconsistencies in the various sets of conditions.

40. We are of the opinion, along with the Special Committee, that an effort should be made to achieve practical uniformity in airlines' Conditions of Carriage

and, should the Traffic Conferences share this point of view, we suggest that this project be undertaken without delay.

41. As to the method of treating this subject, we recommend as a first step that, under the supervision of the Special Committee, a study should be carried out to determine to what extent general agreement amongst airlines can be attained at this stage. The study should include a review of the most recent draft of the Conditions of Carriage, in the light of the present resolutions, to establish which procedures and rules laid down therein have already become uniform by virtue of existing Traffic Conferences resolutions and which procedures and rules require further Traffic Conference action to secure general adoption.

42. The Conferences would then have to determine in what manner uniformity could best be achieved, namely by separate resolutions covering specific subjects or by a package plan combining the entire Conditions of Carriage as a unit. Once the preparatory work is completed, we visualize a joint effort with the Special Committee and the Traffic Advisory Committee to bring forward a project acceptable to the Traffic Conferences.

43. The second step would be to explore the disposition of the government agencies interested in this matter so as to ensure their approval once Conference action is taken.

Conclusion

44. So much for our work and plans. I would now like to record my indebtedness and thanks to the members of the Legal Committee, to Professor John C. Cooper and to our Secretary, Mr. Julian Gazdik, without whose esteemed assistance, advice and co-operation my task as Chairman would not have been nearly as agreeable as it in fact was. To the Chairman and members of the Sub-Committee on the Collisions Convention must also go a special word of appreciation for the considerable time and energy they devoted to the task entrusted to them.

A. M. Conradie

CURRENT LEGISLATION AND DECISIONS

Supplemental Air Transportation—Public Law 87-528

Public Law 87-528[1] amends various sections of the Federal Aviation Act of 1958.[2] In addition it sets up new laws for interim operating authority and continuity of operations by supplemental air carriers which are currently operating under a semblance of authority granted by the Civil Aeronautics Board.[3]

The more important sections of the Federal Aviation Act of 1958 affected will be treated in more detail following this general summary of the new law. Congress, through P.L. 87-528, has changed or added definitions of "Supplemental air carrier,"[4] "Supplemental air transportation,"[5] a provision for the issuance of certificates of public convenience and necessity to engage in supplemental air transportation,[6] a section permitting terms and conditions, as stipulated by the Board, to be placed in the certificate,[7] a clause giving the Board power to require the supplemental air carriers to acquire public liability insurance, and to file performance bonds under certain circumstances.[8] In addition Public Law 87-528 makes supplemental carriers ineligible for mail subsidy,[9] gives the Board power to issue special operating authorization where it finds that supplemental air service is required in addition to regularly scheduled services,[10] makes final disposition of all the applications brought under any phase of the *Large Irregular Air Carrier Investigation*,[11] and finally, provides for amendment of the civil and criminal penalties of the Federal Aviation Act of 1958.[12]

The new statute is the end result of an investigation begun in 1951 to

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[1] 76 Stat. 143 (July 10, 1962).

[2] 49 U.S.C. § 1301-1542 (1958).

[3] Those carriers operating under CAB Orders No. E-9744 (Nov. 15, 1955), E-13436 (Jan. 28, 1959), E-14196 (July 8, 1959), and P.L. 86-661, 74 Stat. 527 (July 14, 1960).

[4] 76 Stat. 143, § 1: "an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation."

[5] 76 Stat. 143, § 1: "*charter trips* in air transportation other than the transportation of mail by aircraft, rendered pursuant to section 401 (d) (3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401 (d) (1) and (2) of this Act." (Emphasis added.)

[6] 76 Stat. 143, § 2: "In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. *Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.*" (Emphasis added.)

[7] 76 Stat. 143, § 3: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; *except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d) (3) of this section.*" (Emphasis added.)

[8] 76 Stat. 144, § 4.

[9] 76 Stat. 145, § 5.

[10] 76 Stat. 145, § 6.

[11] 76 Stat. 149, § 11.

[12] 76 Stat. 149, § 12-13.

determine the status of the so-called "large irregular air carriers"[13] and the Board's orders resulting from that investigation.[14]

To understand fully the reasons for the development of this legislation it is necessary to examine briefly the background and evolution of the irregular carrier.[15] When the Civil Aeronautics Act of 1938[16] was adopted, it was apparent that it would be both inequitable and impractical to subject all carriers or operations, regardless of their circumstances, to the provisions of the Act. Therefore a section was incorporated in the Act to allow the Board to exempt certain classes of operators or carriers from some of the restrictions in the Act.[17] This exemption provision was carried over into the Federal Aviation Act of 1958, and is still in existence today.[18] This concept of exemption from certification worked fairly well until the close of World War II. Following the war every segment of the air transportation industry enjoyed tremendous growth, far beyond anything imagined by the Congress when it enacted the Civil Aeronautics Act of 1938. Large numbers of ex-military pilots and surplus aircraft furnished entrepreneurs an easy access to the necessary personnel and equipment, and the exemption provision of the 1938 Act provided the quickest and surest method of entry into the air carrier field. The expansion of the irregular carriers was phenomenal, and most operators envisioned a very happy future. But by 1951 this growth was beginning to cause some rather severe problems of competition between the route carriers and the irregular carriers. This condition coupled with the Board's power to exempt certain classes of carriers from the provisions of the Act prompted one observer to comment: "In recent years, this [exemption] section has reached a level of importance which if left unchecked could render all outstanding certificates of public convience and necessity mere pieces of paper of no greater value than a World War II ration coupon."[19]

In 1951 the Board undertook to define its policy in relation to the large irregular air carriers in a proceedings which consolidated some sixty-six applications for continued, enlarged or original exemption authorizations.[20] It is significant to note the large number of intervenors in the proceedings[21] and the varied segments of the economy represented. Included were the principal certificated route carriers, civic and governmental bodies, railroads and industry associations.[22] Judging from the large number and diversity of intervenors it would appear that the irregular carriers had certainly generated some real competitive problems.

[13] Large Irregular Air Carrier Investigation, CAB Order No. E-5722 (Sept. 21, 1951), 14 C.A.B. 459.

[14] Large Irregular Air Carrier Investigation, CAB Order No. E-9744 (Nov. 15, 1955), 22 C.A.B. 838; CAB Order No. E-13436 (Jan. 28, 1959), 28 C.A.B. 224; CAB Order No. E-14196 (July 8, 1959), 29 C.A.B. 419.

[15] See Naterville, *The Regulation of Irregular Air Carriers; A History*, 16 J. Air L. & Com. 414 (1949).

[16] 52 Stat. 973 (1938) (now Federal Aviation Act of 1958, 49 U.S.C. § 1301-1542 (1958)).

[17] Civil Aeronautics Act of 1938 § 416(a)-(b), 52 Stat. 1004.

[18] 49 U.S.C. § 1386 (1958).

[19] Craig, *A New Look at Section 416(b) of the Civil Aeronautics Act*, 21 J. Air L. & Com. 127 (1954).

[20] Large Irregular Air Carrier Investigation, CAB Order No. E-9744 (Nov. 15, 1955), 22 C.A.B. 838.

[21] Some 30 different organizations were represented.

[22] See 22 C.A.B. at 855-56.

The Board's Order, E-9744,[23] which stated a new policy towards the large irregular air carriers, was the product of that investigation. The large irregular carriers were designated Supplemental Air Carriers, and were given interim authority to conduct: (1) unlimited charter operations on a plane-load basis for the carriage of passengers and property in domestic, overseas and territorial (except Alaska) operations; (2) charter operations for carriage of passengers in international operations on an individual exemption basis (similar to that set forth in the 1955 Transatlantic Charter Policy);[24] and (3) individually ticketed or way-billed operations by each carrier not to exceed ten trips per calender month in the same direction between any two points (except for intra-Alaska operations and except for the carriage of passengers in international operations). Of the sixty-six original applicants forty-nine large irregular air carriers were granted interim exemption, pending hearings on each of their individual applications.[25]

It was the third provision above which was to prove to be the most controversial and the most vulnerable portion of the Board's decision. The intervening certificated carriers attacked the ruling on the basis of the Board's failure to find facts sufficient to show "undue burden" as required by the statute.[26] The United States Court of Appeals agreed[27] and stated in effect that even though it was true the Board had been operating under the exception provision for many years, and that the Board had in all probability not stated any more extensive facts to support their conclusions of undue burden in prior cases than they had in this case, in the prior decisions the carriers were truly irregular. In this case the applicants closely resembled the certificated route carriers by virtue of being designated supplemental air carriers and by the provision allowing them a form of scheduled operation between any two points.[28] Consequently the Board had to meet the standards of the statute and show facts to support its conclusion that there would be an undue burden on the applicant by not exempting him from the Act. The case was remanded to the Board for its further findings of fact to support its conclusions.

While the Board was contemplating this reversal, the Federal Aviation Act of 1958 was passed. The new Act made no change in the significant provisions of the 1938 Act[29] and was in no way determinative of what was to occur in the later final decision by the Board.[30] The Board's 1959 Order E-13436[31] dealt primarily with the form in which the final authorization should be granted to the supplemental air carriers. Confining its decision to domestic service only, the Board reconfirmed the unlimited

[23] See *supra* note 20.

[24] CAB Order No. E-9221 (May 20, 1955), 20 C.A.B. 782.

[25] See *supra* note 20.

[26] Civil Aeronautics Act of 1938 § 416(b), 52 Stat. 1004, provides that the Board may exempt from the provisions of Title IV:

> any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an *undue burden* on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest. (Emphasis added.)

[27] American Airlines, Inc. v. CAB, 235 F.2d 845 (D.C. Cir. 1956).

[28] 22 C.A.B. 838, 854 (1955).

[29] Section 416(b) of the Federal Aviation Act of 1958 is substantially the same as § 416(b) of the Civil Aeronautics Act of 1938.

[30] CAB Order No. E-13436, 28 C.A.B. 224 (1959).

[31] 28 C.A.B. 224 (1959).

charter provision and the ten trip individual sale provision.[32] However, the Board this time approached the problem as one of limited certification rather than of exemption. In all likelihood this was prompted by the difficulty encountered in the 1955 decision and the problem of finding facts to support the undue burden requirement in the case of a supplemental air carrier.[33] The Board based its decision upon the broad congressional intent demonstrated by the enactment of the Federal Aviation Act of 1958. This intent seemed to be that the development of the air transportation industry should be based primarily upon a process of certification. Hence, as the supplemental carriers had proved to be an important segment of the industry, they should be given the dignity, protection and authorization of certification to insure proper development, rather than be left to the hazards of piecemeal exemption.

Even though congressional intent probably was to foster development of the air transportation industry through the use of certification, it hardly seems reasonable to impute this intent to Congress with respect to the supplemental air carriers in view of the fact that these carriers were not in existence when the appropriate sections of the Civil Aeronautics Act of 1938 were passed. Since the Federal Aviation Act of 1958 was silent concerning supplemental carriers it shed no new light on the decision.[34] The new basis for the decision by no means settled the problem. The intervenors contended that the Board had no power to restrict the certificate[35] and that it had failed to designate the terminal base points of operation.[36] On appeal the court again found the intervenors contentions to be correct and stated that the authorization in the certificate granted the supplemental air carriers violated section 401(e) of the 1958 Act.[37] The failure to designate the terminal base points in the certificate was also held to be a violation of the same section. The court remarked

[32] 22 C.A.B. at 854.

[33] The probability that the requirement of certification would be an undue burden on the small or fixed base operator was the primary reason for the inclusion of § 416(b). It provides for exception from any or all of the economic regulations of Title IV. However, as the self sufficiency of the large irregular carriers became established, the concept that conformity to the provisions of the Act would be an undue burden narrowed considerably. Compliance with some of these requirements was ordered in 1947 (12 Fed. Reg. 3076 (1947)). These carriers were ordered to comply with, among others, the tariff filing provisions, the anti-discrimination laws and the rules concerning disclosure of stock ownership. In 1949 the regulations were amended (14 Fed. Reg. 1879, 1883 (1949)) to require compliance with all provisions of the Act except certification, the duty to provide adequate service as per certificate and through service upon reasonable request; and the requirement of filing detailed schedules with the Postmaster General to facilitate mail carriage distribution. This was the status of the carriers involved prior to their re-classification as supplemental carriers by the 1955 Board decision. It is, as the court stated, difficult to conceive that not exempting this class of carriers from the certification requirement would, in the absence of clear facts, work an undue burden on them.

[34] It was clearly announced that the re-enactment did not constitute legislative adoption of administrative interpretations or judicial decisions, and that the re-enactment was to be considered a neutral factor in future questions of interpretation. 1958 U.S. Code Cong. & Ad. News 3741, 3750.

[35] The essential wording of § 401(e) of the Federal Aviation Act of 1958 (49 U.S.C. § 1371(e)) states: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change *schedules*, equipment, and facilities for performing the authorized transportation and service as the development of the business and demands of the public shall require." (Emphasis added.)

[36] Section 401(e) of the Federal Aviation Act of 1958 (49 U.S.C. § 1371(e)) also provides: "Each certificate issued under this provision *shall specify the terminal and the intermediate points*, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered;" (Emphasis added.)

[37] United Airlines, Inc. v. CAB, 278 F.2d 446, (D.C. Cir. 1960).

that the position of the Board was unfortunate, but that the remedy lay with new legislation, not with an erroneous interpretation of the statute. The United States Supreme Court granted certiorari,[38] vacated the judgment and remanded with the instruction to retain jurisdiction until such time as Public Law 86-661[39] expired or new legislation was enacted.

As a result of these two court decisions the supplemental air carrier concept as envisioned by the Board was wiped out. However, Public Law 86-661 was enacted afer the two decisions above to preserve the status quo by granting temporary authority for the Board's then existing Orders[40] growing out of the *Large Irregular Air Carrier Investigation.* This Act provided the necessary time allowance in which Congress could enact the present law.

The Board's orders were considered a substantial victory for the supplemental carriers. The permission to compete with regular certificated route carriers, the requirement for irregularity being removed and the ability to advertise a limited schedule provided the supplemental carriers with a rather large degree of freedom of operation. However, the Board retained the power to reduce the number of allowable scheduled flights per calender month should it become necessary in order to protect the route carrier from undue damaging competition. The rule that there could be no pooling of services and mergers of operations was already in existence. With these two provisions of control the Board felt there was sufficient protection for the route carriers.

The underlying policy of the Board's decisions reflected the view that there was a definite need for supplemental service during peak periods of travel between certain points, and as the regular route carriers could not fill this need during those periods[41] it was in the public interest to provide the best service possible. The Board felt that through its Orders this necessary service could be performed with a minimum of damage to the regular route carriers. As evidenced by the court decisions previously discussed, the chief problem the Board encountered was in trying to institute this concept under a statute which was not designed to cope with such a situation. It became obvious after the last decision reversing the Board's Orders that specific legislation was necessary if the supplemental carrier was to survive. There is no doubt that a supplemental service is necessary and that it can, under proper circumstances and regulations, be beneficial to the public without damaging the regular route carriers. Public Law 87-528 is an attempt to insure the public proper service without causing undue competition among the supplemental carriers and the regular route carriers. In considering the various sections of the new law only the more important sections will be discussed in detail. The remaining sections will be touched upon briefly.

The new law would appear to have been well devised to meet the

[38] American Airways, Inc. v. United Airlines, Inc. 364 U.S. 297 (1960).

[39] Supplemental Air Transportation, Public Law 86-661, 74 Stat. 527 (July 14, 1960) (Expired March 14, 1962).

[40] See *supra* note 14.

[41] It was recognized by the Board's investigation that if a route carrier were required to purchase additional aircraft or equipment, hire more pilots and personnel to handle certain peak periods, this equipment would sit idle during a large portion of the time. Such a procedure would not only be wasteful but detrimental to the public good, as the additional operating expense involved would eventually come out of the public's pocket through higher subsidy requirements or increased fares.

situation which arose from the difficulty encountered by the Board's decisions. The more important provisions of the Act overcome the objections raised by the two court decisions and also provide for a realistic approach to the problem of balancing the conflicting interests of the regular route carriers, the supplemental carriers and the public. We now turn to an analysis of the pertinent sections of the new law.

Section 1 of Public Law 87-528 amends section 101 of the Federal Aviation Act of 1958[42] by providing definitions of "Supplemental air carrier"[43] and "Supplemental air transportation."[44] It should be noticed that the definition of supplemental air transportation includes the phrase "charter trips." Thus it would seem that the basic concept of supplemental air transportation has become one of a carrier operating under a limited certificate and restricted to charter operations (subject to an exception found in a subsequent section to be discussed later). This provision conflicts with the Board's previous concept of the supplemental carrier as one operating on an unlimited charter basis with a form of limited scheduling ability.

Section 2 amends section 401(d) of the 1958 Act[45] by providing that carriers classified as supplemental may be certified when the Board finds that the applicant is fit, willing and able to perform the service and abide by the appropriate rules and regulations. The amended section[46] also expressly provides that the Board shall have the power to insert limitations in the certificate to insure that the service rendered will be limited to supplemental air transportation as defined in the Act. This provision is a direct adoption of the Board's concept of limited certification announced in its 1959 decision.[47]

Section 3 provides for amendment to section 401(e) of the Federal Aviation Act of 1958.[48] It is this new paragraph which expressly provides that the Board need not specify, except as it deems practical, the terminal points in the supplemental carrier's certificate. However the geographical area in which service is to be rendered must be designated.[49] This section therefore avoids the courts decision on this point.[50] The original provision is retained as to regular certified route carriers.[51]

Section 6 of the new law changes Title IV of the 1958 Act[52] by adding a new section. This section provides that, on an individual basis and after investigation, the Board may authorize limited scheduled flights between certain designated points by a supplemental carrier. This provision incorporates to a certain extent the Board's previous holding that under certain circumstances scheduled flights by supplemental carriers

[42] 49 U.S.C. § 1301 (1958).
[43] See *supra* note 4.
[44] See *supra* note 5.
[45] 49 U.S.C. § 1371(d) (1958).
[46] See *supra* note 6.
[47] Large Irregular Air Carrier Investigation, CAB Order No. E-13436 (Jan. 28, 1959), 28 C.A.B. 224.
[48] 49 U.S.C. § 1371(e) (1958).
[49] "(3) A certificate issued under this section to engage in supplemental air transportation shall designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the geographic area or areas within or between which service may be rendered."
[50] See *supra* note 37.
[51] See *supra* note 7.
[52] 49 U.S.C. § 1371-1386 (1958).

should be authorized.[53] It will be noted that the provision is not nearly so broad as the Board's earlier action in permitting scheduled flights by any supplemental carrier anywhere in the United States. This amendment seems superior to the rulings made by the Board, since under the latter any number of supplemental carriers were free to compete between any two points at the same time if they desired with the resultant probable loss of revenue to the regular route carrier. Under Section 6 the capacity for air transportation by the holder of the certificate of public convenience between two points must be insufficient to meet the demand now or at some future time,[54] and only then will one or more supplemental carriers be allowed to provide the service required.[55] This provision should protect not only the route carrier but also the supplemental carrier awarded the run in that they will not be subjected to possible unlimited competition from other supplemental carriers.

Section 9 gives the Board the power to permit the supplemental carriers to make an orderly transition to an all charter operation. The Board may allow a two year period during which any existing authorization for individually ticketed and individually way-billed services may be continued subject to the following limitation. The annual gross revenue of such holder from services provided under this section shall not exceed during each year of the two year period the average annual gross revenue from individually ticketed and individually way-billed services earned during the period from January 1, 1959 through December 31, 1961.[56]

The remaining sections of the new law have been mentioned briefly at the beginning of this note;[57] the more important provisions have been given a more detailed treatment; and an attempt has been made to compare the status of the supplemental carrier under the Board's decisions to the status of the supplemental carrier under the new law.

In summary and conclusion, the Board's decisions provided the supplemental air carriers with large freedom of operation; they enjoyed unlimited charter capabilities; they were free to move about the United States and compete with the route carriers, at least to the extent of ten

[53] New Section 417, Federal Aviation Act of 1958, (49 U.S.C. § 1371-1386 (1958)) reads: "(a) If the Board finds upon an investigation conducted on its own initiative or upon request of an air carrier—

(1) that the capacity for air transportation being offered by the holder of a certificate of public convenience and necessity between particular points in the United States is, or will be, temporarily insufficient to meet the requirements of the public or the postal service; or

(2) that there is a temporary requirement for air transportation between two points, one or both of which is not regularly served by any air carrier; and

(3) that any supplemental air carrier can provide the additional service temporarily required in the public interest; the Board may issue to such supplemental air carrier a special operating authorization to engage in air transportation between such points.

(b) A special operating authorization issued under this section—

(1) shall contain such limitations or requirements as to frequency of service, size or type of equipment, or otherwise, as will assure that the service so authorized will alleviate the insufficiency which otherwise would exist, without significant diversion of traffic from the holders of certificates for the route;

(2) shall be valid for not more than thirty days and may be extended for additional periods aggregating not more than sixty days; and

(3) shall not be deemed a license within the meaning of section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)).

[54] New Section 417(a)(1) of the Federal Aviation Act of 1958, see *supra* note 53.

[55] New Section 417(a)(3) of the Federal Aviation Act of 1958, see *supra* note 53.

[56] 76 Stat. 148, § 9.

[57] See *supra* notes 3 through 12 and accompanying text.

flights per month between any two points; they were free to advertise this limited scheduled service; the only check on the limited scheduled operations was the Board's ability to reduce the number of authorized trips on a blanket basis.

There can be no doubt that the Board's decisions did much to strengthen the supplemental carriers' position, but did little to protect the route carrier from destructive competition. The new law has remedied this inequity somewhat as previously discussed. Public Law 87-528 was definitely needed, not only to save the life of the supplemental carriers, but more importantly to provide specific legislation to deal with a type of carrier which was neither in existence nor contemplated, when the Civil Aeronautics Act of 1938 was passed. It was the Board's attempt to deal with a situation not contemplated which caused all the expense and loss of time. This time and money could have been saved by providing legislation when it became reasonably apparent that the problem was developing and would, in all likelihood, become worse as time passed.

The type of supplemental air service envisioned by Congress in the new law is considerably more conservative than the type developed by the Board. The Act now specifically provides that supplemental carriers shall be restricted to charter operations within defined geographical limits, with the right to scheduled operations only after showing a need for scheduled supplemental service in that area, or between those points. This law has taken from the supplemental carriers a large portion of the freedom of operation gained by them under the Board's decisions. However, it would seem that under the amended Act the Board now has the power, as limited by the Act itself, to provide for the increased healthy growth of the supplemental carrier and the route system, and to provide better and more efficient service for the benefit of the public without damaging the route carriers. Under this Act the supplemental carriers will be given the benefit of certification. They should also be provided with a fair assurance of revenue, since they can now be protected from the destructive competition of other supplemental carriers. In addition the new law will assure that the nature and operation of the supplemental carriers will remain supplemental, thus protecting the route carriers. Finally, all the interested parties should be relatively pleased that, after some twelve years from the beginning of the *Large Irregular Air Carrier Investigation,* the Act has made final disposition of the Board's Orders and court decisions growing out of that investigation. Public Law 57-528 seems well suited to the problem, and if properly administered, should provide the necessary additional services required by the public and at the same time should strike a happy balance between the interests of the route carriers and the supplemental carriers.

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